88-1456

No.

Supreme Court, U.S.
FILED
MAR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT J. IPPOLITO, JUDY IPPOLITO, WAYNE A. GERENSTEIN, NANCY M. GERENSTEIN, MICHAEL J. GOODMAN and PEGGY GOODMAN,

Petitioners,

v.

WNS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WAYNE B. GIAMPIETRO
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 236-0606/332-6000

Attorneys for Petitioners

March 3, 1989

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. May one requesting personal financial information about a consumer avoid liability under the Fair Credit Reporting Act, 15 U.S.C. § 1681a *et seq.*, by labelling such a request a business request, even though he has no legitimate business purpose for requesting that information?

2. May one requesting personal financial information about a consumer avoid liability under the Fair Credit Reporting Act, 15 U.S.C. § 1681a *et seq.*, by claiming that he was ignorant of his obligations under that Act?

LIST OF ALL PARTIES IN THE COURT OF APPEALS

Plaintiffs-Appellees, Cross-Appellants (Petitioners in this Court):

Vincent J. Ippolito
Judy Ippolito
Wayne A. Gerenstein
Nancy M. Gerenstein
Michael J. Goodman
Peggy Goodman

Defendant-Appellant (Respondent in this Court):

WNS, Inc.

Defendant-Cross-Appellee (not a party before this Court):

Equifax Services, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE:	
I. NATURE OF THE CASE	6
II. STATEMENT OF RELEVANT FACTS	6
REASONS FOR GRANTING THE WRIT:	
Summary Of Argument	12
I.	
THE COURT OF APPEALS HAS DEVISED AN IMPROPERLY NARROW DEFINITION OF "CONSUMER REPORT" UNDER THE FAIR CREDIT REPORTING ACT AT ODDS WITH THE DECISIONS OF ALL OTHER CIRCUITS	13
II.	
RESPONDENTS' IGNORANCE OF THE LAW DOES NOT EXCUSE THEIR WRONGFUL CONDUCT	21
CONCLUSION	23

APPENDIX

A— Opinion and Judgment Order, United States Court of Appeals for the Seventh Circuit (December 5, 1988), reported at 864 F.2d 440 (7th Cir. 1988) A-1

B— Opinion, United States District Court, denying Defendants' Motion to Dismiss Complaint (June 30, 1986), 636 F. Supp. 471 (N.D. Ill. 1986) ... B-1

TABLE OF AUTHORITIES

Cases	Page
Belshaw v. Credit Bureau of Prescott, 392 F. Supp. 1356 (D. Ariz. 1975)	13
Boothe v. TRW Credit Data, 557 F. Supp. 66 (S.D. N.Y. 1982)	16
Greenway v. Information Dynamics, Ltd., 399 F. Supp. 1092 (D. Ariz. 1974)	16
Hansen v. Morgan, 582 F.2d 1214 (9th Cir. 1978)	17, 18
Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir. 1980)	17, 18
Houghton v. New Jersey Manufacturers Insurance Company, 795 F.2d 1144 (3d Cir. 1986)	18
Hovater v. Equifax, Inc., 823 F.2d 413 (11th Cir. 1987)	18
Kennedy v. Border City Savings & Loan Association, 747 F.2d 367 (6th Cir. 1984)	20
North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925)	22
Rice v. Montgomery Ward & Co., Inc., 450 F. Supp. 668 (M.D. N.C. 1978)	16
Russell v. Shelter Financial Services, 604 F. Supp. 201 (W.D. Mo. 1984)	16
Texaco, Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982)	22
Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987)	18

Statutes

15 U.S.C. § 1681a 2, 14, 16
15 U.S.C. § 1681b 4, 13, 14
15 U.S.C. § 1681n 5, 13, 20
15 U.S.C. § 1681o 5, 13
15 U.S.C. § 1681q 5, 13, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT J. IPPOLITO, JUDY IPPOLITO, WAYNE A. GERENSTEIN, NANCY M. GERENSTEIN, MICHAEL J. GOODMAN and PEGGY GOODMAN,

Petitioners,

v.

WNS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 5, 1988.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 864 F.2d 440, and is reproduced in the Appendix. The opinion of the District Court for the Northern District of Illi-

nois, Eastern Division, denying Respondent's Motion to Dismiss the Complaint, issued prior to the trial of this cause to a jury, is reported at 636 F. Supp. 471 (N.D. Ill. 1986), and is also included in the Appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit were entered on December 5, 1988. No petition for rehearing was filed. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1681a

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of

living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and

officer of another local union, Local 320, also affiliated with the IUOE. This case arises out of disciplinary action which Local 660 took against Hester.

The International's Constitution, with which all members of the IUOE agree to comply upon becoming members of an IUOE local and of the IUOE, prohibits members of one IUOE local union from working within the jurisdiction of another IUOE local without obtaining that local's consent. In August, 1983, Hester accepted a job with the Tennessee Valley Authority to which Local 660 had referred another individual; although the job was within the Local's jurisdiction, Hester did not seek or obtain the consent of the Local before accepting that job.

On September 15, 1983, the President of Local 660 filed internal union disciplinary charges against Hester. The charge alleged that by "seeking and accepting employment . . . in the jurisdiction of Local 660 without consent on or about August 20, 1983" Hester had violated Article XV, Section 3(a) of the IUOE Constitution.[1]

On October 7, 1983, Hester sent a letter to Local 660 asserting that "[t]he charges against me are improper under Section 101(a)(5) of the Landrum-Griffin Act because they lack specificity and it is impossible to prepare a defense to such unintelligible charges." Hester's letter went on to claim that he had a "right[] under the [collective bargaining] contract" to accept the job in question. Hester's letter was drafted by a lawyer Hester had retained for these purposes.

---

[1] Art. XV, Sec. 3(a) of the IUOE Constitution provides, in relevant part, that: "Members of one Local Union shall not seek employment, be employed, or remain at work at the craft within the territorial jurisdiction of another Local Union without the consent of such other Local Union, which consent may be evidenced by its acceptance of the clearance card presented to it by the member involved, as provided in the Constition, or by the issuance of the service dues receipt hereinafter described".

On November 8, 1983, Local 660 held a trial on the charges against Hester. Hester chose not to participate in that trial. Based on the evidence presented, Hester was found guilty as charged and was fined $3,000.

Article XVII, Section 1(a) of the IUOE Constitution establishes an internal union appeal procedure by which a member may appeal to the International's General Executive Board from any action by any IUOE local union adverse to the member. Upon receiving the appeal and the local union's response, the matter is referred to a panel of the General Executive Board; the panel makes a recommendation to the General Executive Board which renders a decision. Should the local or the member be dissatisfied with the General Executive Board's decision, either may appeal from that decision to the International's General Convention which is held quadrennially.

Upon learning of the discipline imposed upon him by Local 660, Hester chose to exercise his appeal right under the IUOE Constitution. Pending the resolution of the appeal, the International's General President stayed payment of the fine.

The panel of the General Executive Board to whom the case was assigned found that the charges that had been filed against Hester were sufficiently specific to allow Hester to prepare his defense, that Hester was guilty of violating the Constitution, but that the fine was excessive and should be reduced to $500. By letter dated August 6, 1984, Hester was notified that the General Executive Board had adopted the recommendation of the panel.

On November 7, 1984, more than one year after Hester had claimed that Local 660 was proceeding against him in violation of law and exactly one year after he was informed of the Local's disciplinary action, Hester instituted this action in federal court. He named as defendants both Local 660 and the IUOE. Hester's com-

plaint alleged that by disciplining him, the Local had violated his rights under § 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) ("LMRDA"), and that by affirming that discipline the International also had violated LMRDA § 101(a)(5).[2] The complaint further charged the International and the Local with breach of the duty of fair representation.[3]

Local 660 and the IUOE each moved separately to dismiss the charges based on the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). The district court, *sua sponte*, decided it did not have jurisdiction over Hester's claims and dismissed them without reaching the unions' statute of limitations arguments.

On appeal, a panel of the Eleventh Circuit reversed the district court's decision with respect to jurisdiction and went on to address the statute of limitations arguments. The court of appeals first unanimously held, in accordance with its prior decision in *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 474 U.S. 1057, that NLRA § 10(b)'s six-month statute of limitations applies to LMRDA claims such as those alleged by Hester. But the majority of the panel (Tuttle and Kravitch, JJ) went on to rule that in order to "permit[] a union member to seek relief through union grievance procedures without foreclosing his or her right to sue in the event these procedures prove ineffective," the statute of limita-

---

[2] After the International General Executive Board issued its decision on the appeal, Local 320, the Local to which Hester belonged, informed Hester that, until he paid the fine, it would not accept his dues and would suspend his membership for non-payment of dues. Based on that action, Hester sued Local 320 as well alleging a further violation of § 101(a)(5).

[3] Hester later amended his complaint to add a pendent Alabama state claim.

tions should be tolled until "the point where the grievance procedure [*viz.*, the internal union appeals procedure] was exhausted or otherwise broke down to the employee's disadvantage." Pet. App. 23a. Because Hester commenced suit within three months of that time the majority found Hester's complaint to be timely.

This conclusion drew a lengthy dissent from Judge Tjoflat. He reasoned that plaintiff's complaint alleged "discrete LMRDA violations" by Local 660 and the International and that the "statute of limitations began to run as to each of these defendants on the day Hester received notice of its LMRDA violation." *Id.* 34a, 35a. Because Hester "had concluded" as of October 7, 1983, "that Local 660 was proceeding against him in violation of LMRDA's bill of rights," Judge Tjoflat reasoned, "[o]n that date, he had an absolute right to file suit in the district court against Local 660." *Id.* at 34a. As "Hester did not bring suit against Local 660 . . . until . . . well after the six-month statute of limitations had run, Hester's federal claim against Local 660 is . . . time-barred." *Id.* at 36a.

Judge Tjoflat sharply criticized the majority's contrary conclusion, reasoning as follows:

> The majority has created a strange scheme: if the union member who has been wronged by his union does not file suit in district court before exhaustion of internal remedies, his cause of action does not accrue, and the limitations period does not begin to run, until exhaustion. On the other hand, under the majority's theory, if the union member who has been wronged by his union does file suit in district court before exhaustion of internal remedies, his cause of action has accrued, and, under appropriate circumstances, the district court can decide the case. I cannot imagine that Congress intended this non sequitur. Moreover, I do not see how the majority's scheme is consistent with any policy underlying our federal labor laws. [Pet. App. 40a]

REASONS FOR GRANTING THE WRIT

This Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), holding that NLRA § 10(b) supplies the limitations period for a "hybrid § 301/fair representation" claim, has generated a series of important, interrelated questions concerning the limitations period for the multitude of federal labor law causes of action. The court below in deciding one such question reached a result that is fundamentally inconsistent with the decisions of this Court, and of other courts of appeals, and contrary to the national labor policy. For these reasons, which we develop in detail below, the decision below warrants review by this Court.

A. In *DelCostello*, this Court held that in determining the limitations period for a federal cause of action for which Congress has not enacted an express statute of limitations, the federal courts should "not hesitate[] to turn away from state law" where "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake, and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." 462 U.S. at 172. Following that approach, the *DelCostello* Court "borrowed" NLRA § 10(b) as the appropriate limitations period for a "hybrid § 301/fair representation claim," 462 U.S. at 165, *viz.*, "a claim [under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185] that the employer had breached a provision of a collective bargaining agreement and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings," *id.* at 154. The Court reasoned that: the hybrid action "has no close analogy in ordinary state laws," *id.* at 165; application of a long state-law limitations period would "preclude the relatively rapid resolution of labor disputes favored by federal law," *id.* at 168; and that § 10(b) provides a "federal statute of limitations actually designed to accommodate a balance of interests

very similar to that at stake" in hybrid lawsuits and therefore "more apt than any of the suggested state-law parallels," *id.* at 169.

Since *DelCostello*, the threshold question the lower federal courts have confronted in cases brought under the LMRDA has been whether to "borrow" § 10(b) for such claims. Seven of the circuits—including the court below—have answered that question in the affirmative, at least with respect to LMRDA actions like the one here which involves claims that are related to employment rights;[4] one of those circuits (the First), joined by the Second Circuit, has reached a contrary conclusion with respect to LMRDA claims that are *not* related to employment rights.[5]

The choice of a limitations period generates a second, closely related threshold question: under what circumstances is the limitations period for filing LMRDA claims tolled. The resolution of that question is no less important than the choice of a limitations period in determining the timeliness of LMRDA suits, because "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application," and "[a]ny period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975). And if, as the courts of appeals have

---

[4] *Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984); *Local 1397 v. Steelworkers*, 748 F.2d 180 (3rd Cir. 1984); *Reed v. United Transp. Unions*, 828 F.2d 1066 (4th Cir. 1987); *Adkins v. Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Clift v. UAW*, 818 F.2d 623 (9th Cir. 1987); *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 474 U.S. 1057.

[5] *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986); *Rodonich v. House Wreckers Union, Local 95*, 817 F.2d 967 (2d Cir. 1987).

unanimously concluded, federal law—specifically, NLRA § 10(b)—provides the limitations period for at least some types of LMRDA claims, the tolling issue stated above must be answered as a matter of *federal* law as well. *See Chardon v. Fumero Soto*, 462 U.S. 650, 660-61 (1983); *cf. West v. Conrail*, —— U.S. ——, 55 L.W. 4466 (April 6, 1987).[6]

As we proceed to show, the court below, while correctly recognizing that the tolling question is a federal question, gave an answer that is at war with the prior decisions of this Court, as well as with the national labor policy.[7]

---

[6] If, contrary to the holding of the court below and of the other courts of appeals to consider the question, a state statute of limitations were properly "borrowed" here, "this 'borrowing' logically [would] include[] rules of tolling" as well, at least so long as the state tolling rule were not " 'inconsistent' with federal law," *Board of Regents v. Tomanio*, 446 U.S. 478, 485-86 (1980); *see Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *Johnson v. Railway Express Agency, supra*, 421 U.S. at 463-64. This is true because "[i]n borrowing a state period of limitations for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereon, on the prosecution of a closely analogous claim." *Johnson, supra*, 421 U.S. at 465.

[7] The question whether state law or federal law provides the appropriate limitations period for LMRDA claims like the instant one which implicate the plaintiffs' employment rights is raised by the pending petition for certiorari in *Clift v. Auto Workers*, Sup. Ct. No. 87-42; the Solicitor General has urged this Court to issue a writ of certiorari in *Clift*.

Because the tolling issue raised in this case depends upon the applicability of a federal statute of limitations, *see* n.6 *supra*, if this Court were to grant the petition in *Clift*, we would urge the Court to hold the instant petition pending the outcome of that case. If the Court were to affirm the Seventh Circuit's application of § 10(b) in *Clift*, the tolling question presented here would then merit plenary consideration for the reasons set forth in this petition; if the Court were to hold § 10(b) inapplicable, the instant case would appropriately be remanded to the Eleventh Circuit for reconsideration of the limitations and tolling issues.

B. (1) The starting point for analysis is the fact that, as the court below tacitly acknowledged, *see* Pet. App. 18a-19a & n.24, plaintiff commenced this action *more than six months after his cause of action against Local 660 accrued.* By October 7, 1983, plaintiff had concluded that the Local was proceeding against him in violation of the LMRDA and plaintiff wrote a letter to the Local (drafted by the counsel he had by that time retained) so stating. On November 8, 1983, the Local found plaintiff guilty of the charges that had been proffered against him and imposed a fine upon him; if the Local violated plaintiff's rights under LMRDA § 101 (a) (5)—which establishes basic procedural conditions regarding notice and hearing that a union must satisfy *before* the union may discipline a member—that violation necessarily occurred no later than as of the time of the discipline. Indeed, in the instant case, the Local's involvement ended completely as of November 8, 1983, when the fine was imposed.[8] Yet plaintiff did not com-

---

[8] To be sure, the *International Union's* review of the Local's action did not conclude until August, 1984, three months before plaintiff commenced this action. But the International's review of the matter did not prevent plaintiff's action from accruing against the *Local.*

Under the LMRDA—as under the law of labor relations generally, *cf. Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212 (1979)—a local is itself a labor organization which is obligated to comply with the Act and which can be held liable for its own conduct. *See* LMRDA §§ 3(i), 102, 29 U.S.C. §§ 402(i), 412 (defining labor organization" for purposes of the LMRDA and creating cause of action for breach of Title I). Indeed plaintiff himself has recognized the fact that the local is responsible for its own action by suing the Local separately from the IUOE. *See also Shimman v. Frank,* 625 F.2d 80, 97-98 (6th Cir. 1980), where the court concluded that "it is clear from the International Union of Operating Engineers' Constitution which defines the relationship between th[at] International and its affiliated locals" that the "international union is a separate body from the local" and that IUOE locals enjoy "substantial autonomy in handling [their] own affairs" including the power to "elect their own officers, pass their own by-laws, transact business and *discipline members.*" (emphasis added).

mence this action until November 7, 1984, *one year after* the disciplinary action was taken and thirteen months after plaintiff had concluded that his LMRDA rights were being violated. Thus, absent some tolling, plaintiff's claim against the Local is barred by § 10(b).[9]

(2) The question presented here, then, is whether, as the court below held, an LMRDA plaintiff's delay in filing his claim is excused on the ground that, rather than proceeding directly to court to challenge under § 101(a)(5) a local union's action in disciplining him, the putative plaintiff instead chooses to seek relief from the local's action by invoking an "appeals" procedure created by the international union with which the local is affiliated. This Court has never addressed that issue. But the Court has considered analogous questions under other remedial schemes, and the decision below cannot be squared with this Court's rulings in these closely analogous cases.

The seminal case in this line is *Johnson v. Railway Express Agency*, *supra*, in which the Court concluded that the filing of a charge of an unlawful employment practice under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e-1 *et seq.*, does *not* toll the running of the statute of limitations for a claim under 42 U.S.C. § 1981. While acknowledging that "it is . . . almost to

---

[9] In the court below plaintiff argued that because the International stayed plaintiff's fine, the cause of action against the Local did not accrue until after the International ruled on plaintiff's appeal. But the International did not grant a stay until December 9, 1983, one month *after* the Local had completed its action; thus, whatever relevance the stay may have on the tolling issue discussed in text, the stay could not have prevented the cause of action from accruing as of November 8th. Moreover, plaintiff's argument ignores the fact that in determining when a cause of action accrues, "the proper focus is on the time of the [wrongful] act, not the point at which the consequences of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (emphasis deleted); *see Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980).

be expected that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding," the Court explained that

> the fundamental answer to [this] argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII. Petitioner freely concedes that he could have filed his § 1981 action at any time after his cause of action accrued; in fact, we understand him to claim an unfettered right so to do. Thus, in a very real sense, petitioner has slept on his § 1981 rights. The fact that his slumber may have been induced by his faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent. [421 U.S. at 465-66]

In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court applied the principle of *Johnson v. Railway Express* in contexts quite close to the instant case. In *Robbins & Myers*, the Court held that the filing of a grievance under a collective bargaining agreement alleging a breach of that agreement does *not* toll the statute of limitations for filing a claim that the employer's challenged conduct violated Title VII; the Court explained that "petitioner Guy in the grievance procedure was not asserting the same statutory claim in a different forum . . . but was asserting an independent claim based on a *contract* right." 429 U.S. at 238 (emphasis in original).[10] And in *Ricks* the Court held that

---

[10] In *Board of Regents v. Tomanio, supra*, the Court—in the course of holding that the filing of a state-court administrative review proceeding did not toll the statute of limitations for challenging the state administrative action under 42 U.S.C. § 1983—explained

a college professor who was denied tenure and who filed a grievance over that decision within the college's internally established appeals procedure was required to file a Title VII claim at the same time if the professor wished to preserve his statutory rights. The Court reasoned:

> [W]e already have held the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period [citing *Robbins & Myers*]. The existence of careful procedures to assure fairness in tenure decisions should not obscure the principle that limitations periods normally commence when the employer's decision is made. [449 U.S. at 261]

The decision below cannot be squared with the line of cases from *Johnson* to *Ricks*. The court below stated that it would "construe the section 10(b) limitations rule in a manner that permits a union member to exhaust available internal remedies without foreclosing his or her rights, in the event that this remedy proves ineffective, to seek relief in federal court." Pet. App. 20a. But the "internal remedies" to which the lower court referred exist to adjudicate *contractual* rights stated in the International's Constitution which is, of course, an enforceable contract, *see Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U.S. 615, 619-22 (1981). Those rights, like the contractual rights involved in *Robbins & Myers* or the quasi-contractual rights involved in *Ricks* are "separate from and independent of" plaintiff's *public*

Robbins & Myers in the following terms: "we held . . . that it would not be inconsistent with Title VII to decline to toll the statute of limitations during labor grievance or arbitration procedures because 'contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII "have legally independent origins and are equally available to the aggrieved employee." '". *Board of Regents v. Tomanio, supra*, 446 U.S. at 490.

law rights under the LMRDA, *Johnson*, *supra*, 421 U.S. at 465. Section 103 of the LMRDA, 29 U.S.C. § 413, itself states that "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization . . . under the constitution and bylaws of any labor organization." And there is no doubt that the International, in resolving an appeal from a local's disciplinary action, is not authorized to decide, and does not purport to decide, whether the local violated the LMRDA; rather, the International applies a body of *internal union law* in deciding these cases.

Because that is so, the decision below flies in the teeth of *Johnson* and its progeny. The lesson of those cases is that "when Congress intended to establish a remedy separate and independent from other remedies that might also be available," there is no basis for tolling the various limitations periods so as to "allow a plaintiff to litigate such alternative claims in succession." *Board of Regents v. Tomanio*, *supra*, 446 U.S. at 489. As the First Circuit recently put it, courts are not to "invoke tolling in circumstances where a claimant rides parallel horses in search of relief." *Arriaga-Zayas v. ILGWU*, 835 F.2d 11, 13 (1st Cir. 1987).[11] By permitting the plaintiff to do so here—in the lower court's words, by permitting a would-be-plaintiff first to invoke his contractual rights under a union's constitution, and "in the event that this remedy proves ineffective, to seek relief in federal court." Pet. App. 20a.—the court below rendered a decision which is inconsistent with this Court's rulings and with those lower court cases (like *Arriaga-Zayas*) which have faithfully followed those rulings.[12]

---

[11] *See also Kolomick v. Steelworkers*, 762 F.2d 354, 355-57 (4th Cir. 1985); *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied*, 467 U.S. 1253.

[12] It might be argued that because LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4), states that a union member "may be required to exhaust reasonable hearing procedures (but not to exceed a four

(3) Significantly, the court below did not even cite, let alone discuss, *Johnson* and its progeny, even though they were heavily relied on by the Unions in their briefs to that court.[13] Instead, that court based its decision principally upon a supposed analogy to hybrid § 301/fair

---

month lapse of time)," *Johnson* and its progeny are distinguishable on the ground that those cases involved the use of *voluntary* rather than compulsory alternative remedies. In *NLRB* v. *Marine Workers*, 391 U.S. 418, 426 (1968), however, this Court concluded that § 101(a)(4) does not impose an exhaustion *requirement* but merely permits the courts "in their discretion [to] stay their hands for four months while the aggrieved person seeks relief within the union." *See also* Pet. App. 19a n.24 (majority opinion); *id.* 36a n.14 (Tjoflat, J., dissenting) & cases cited therein. *Marine Workers* thus does not leave room for an argument that would distinguish independent internal union remedies from the other types of independent remedies this Court has considered.

In any event, in the instant case even if the statute of limitations were tolled for the four months *after* the Local completed its disciplinary proceeding—the maximum exhaustion period under § 101(a)(4)—the claim against the Local still would be untimely as the complaint was not filed until one year after the Local completed the disciplinary proceeding. Only if the statute were tolled for the entire period during which plaintiff was pursuing his internal remedies would the claim be timely under § 10(b).

[13] In *Dunleavy v. Steelworkers Local 1617*, 814 F.2d 1087, 1091 n.2 (6th Cir. 1987), the Sixth Circuit, in a decision on which the court below heavily relied, found "the cited civil rights cases are inapposite because of the unique policy behind the LMRDA in favor of resolving internal [labor union] disputes." But the policy of resolving internal union disputes internally is by no means unique. In *Robbins & Myers*, the Court required the plaintiff to proceed directly to court notwithstanding the strong federal policy, embodied in 29 U.S.C. § 203(d), favoring the use of arbitration to resolve disputes under collective bargaining agreements, *cf. Maddox v. Republic Steel Corp.*, 379 U.S. 650 (1965). And in *Ricks* the Court refused to toll the limitations period pending the outcome of the University's internal appeals procedure notwithstanding what the Court subsequently has termed "[c]onsiderations of profound importance [which] counsel restrained judicial review of the substance of academic decisions," *Regents of the University of Michigan v. Ewing*, —— U.S. ——, 54 L.W. 4055, 4058 (Dec. 12, 1985).

representation litigation. Proceeding from the premise that in hybrid suits, a putative plaintiff need not commence his action until "'the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage,'" the court of appeals concluded that it could "find no sufficient reason" for deviating from that rule in the LMRDA context. Pet. App. 18a. That conclusion overlooks the fact that "[t]he contractual [grievance] procedures" at issue in a hybrid lawsuit "are significantly different from the . . . *internal* union procedures" involved here. *Clayton v. Automobile Workers*, 451 U.S. 679, 686 (1981) (emphasis added).

It is, of course, true, that in the context of hybrid suits, a would-be-plaintiff is required to invoke the contractual grievance procedure before the plaintiff may sue his employer. *Maddox v. Republic Steel Corp.*, *supra*. But it is also true that in the hybrid context, the employee may not sue his employer (or union) unless the grievance procedure "has fundamentally malfunctioned by reason of the bad-faith performance of the union," *Hines v. Anchor Motor Freight*, 424 U.S. 554, 569 (1976). Thus in the hybrid context—unlike the LMRDA context—the putative plaintiff does *not* have two separate and independent remedies to pursue; rather, the plaintiff's *only* remedy, initially, is through the contractual grievance procedure, and a judicial remedy becomes available only if the grievance procedure "fundamentally malfunction[s]." Accordingly, the exhaustion rule that is applied in § 301/fair representation litigation is wholly inapposite to the LMRDA context.[14]

Indeed, if an analogy were to be drawn to hybrid litigation, it would be to those cases in which *after* the grievance procedure has been completed, an employee may challenge the union's conduct in prosecuting the

---

[14] Judge Tjoflat develops this point in greater detail in his dissenting opinion below, *see* Pet. App. at 26a-32a, 38a-39.

grievance either in a hybrid lawsuit or in an administrative proceeding before the National Labor Relations Board or a similar state agency. In those cases, several courts of appeals—most recently the First Circuit in *Arriaga-Zayas*—have held, in accordance with *Johnson v. Railway Express* and its progeny, that the statute of limitations for these alternative remedies runs simultaneously, and that the § 10(b) limitations period for hybrid claims is not tolled by the filing of unfair labor practice charges. *See also* cases cited n.11. The instant case cannot be meaningfully distinguished from these latter cases.

C. The conflict between the decision below and the decisions of this Court (and of the courts of appeals which have adhered to this Court's teachings) provides reason enough for this Court to grant a writ of certiorari in this case. There is, however, an additional reason which makes plenary review all the more appropriate in this case: the decision below, if left uncorrected, will produce results at war with the national labor policy.

Most international unions have created appeals procedures like the procedure contained in the IUOE Constitution and, most of these procedures—including the IUOE procedure itself—culminate in an appeal to the international union's convention. Under the decision below tolling continues until this entire process—including the convention appeal—is exhausted; indeed that is precisely what the Sixth Circuit held in *Dunleavy v. Steelworkers Local 1617*, *supra*, a decision on which the court below heavily relied, *see* Pet. App. at 21a-23a & n.26.

Under LMRDA § 401(a), 29 U.S.C. § 481(a), the most frequent interval at which an international union is *required* to hold a convention is once every five years. Given the expense of convening a convention many unions —again including the IUOE—do in fact hold conventions at four or five-year intervals. Thus, in practical terms,

the decision below (and the companion decision of the Sixth Circuit in *Dunleavy*) create up to a *five-year* tolling period for LMRDA claims.[15]

As this Court has observed several times, disposing of labor disputes "relatively rapidly" is one of the core aspects of the national labor policy. *See DelCostello v. Teamsters*, *supra*, 462 U.S. at 168-69 & cases cited therein. Indeed, it is that very policy that led this Court in *DelCostello* to apply the six-months statute of limitations contained in NLRA § 10(b) to hybrid § 301/fair representation claims, and that has led all seven circuits which have considered the question to apply the same limitations period to at least those LMRDA claims which implicate employment rights. *See* cases cited n.4. The decision below substantially thwarts that policy by creating such an expansive tolling procedure.[16]

---

[15] In a 1986 survey of unions affiliated with the AFL-CIO conducted by the Secretary-Treasurer of the AFL-CIO, 19 national unions reported holding conventions at five-year intervals; 24 unions reported holding conventions at four-year intervals; and 43 unions reported holding conventions at two or three year intervals. Only nine unions hold conventions as frequently as once a year.

[16] The majority below argued that deying tolling would "force union members to file fragmentary claims" and thereby result in "a waste of litigant and judicial resources." Pet. App. 22a n.27, 21a. That argument assumes that when an international union reviews a local's action pursuant to an internal appeals procedure, the international is obligated to assure that the local has obeyed public law, and that the international commits an independent violation of the LMRDA if the international allows a local's unlawful action to stand. We know of nothing in the language or the history of the LMRDA which would impose such a duty on internationals to police the conduct of their locals, and at least one appellate court has squarely rejected such an argument, stating that "it is an attempt to find an international union vicariously liable for mere inaction." *Shimman v. Frank*, *supra*, 625 F.2d at 99.

But even if the majority's fears of "fragmentary claims" were sound, the proper solution would be to allow *the courts*, in their discretion, to *stay* LMRDA suits against locals pending the outcome of

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS W. CRAWFORD, JR.
409 North 21st Street
Birmingham, Ala. 35203
(205) 328-9576

DAVID SILBERMAN
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5383

---

appeals within internationals, and *not*, as the court below concluded, to grant *putative plaintiffs* up to a five year period in which they have the option of deciding when to sue.

87-1456

No. ——

Supreme Court, U.S.
FILED
MAR 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 660,
Petitioner,

v.

EDWARD C. HESTER,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THOMAS W. CRAWFORD, JR.
409 North 21st Street
Birmingham, Ala. 35203
(205) 328-9576

DAVID SILBERMAN
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5383

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

TABLE OF CONTENTS

		Page
A.	Opinion of the Court of Appeals, June 12, 1987.....	1a
B.	Opinion of the Court of Appeals in response to the petition for rehearing of the International Union of Operating Engineers, October 20, 1987	42a
C.	Order of the Court of Appeals Denying Local 660's petition for rehearing and suggestion for rehearing en banc, October 20, 1987	49a
D.	Order of the Court of Appeals Denying Appellant's petition for rehearing, December 2, 1987	50a
E.	Judgment of Rehearing of the Court of Appeals, December 23, 1987	51a
F.	Opinion and Order of the District Court, September 15, 1985	53a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-7699

EDWARD C. HESTER,
Plaintiff-Appellant,
v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al.*,
Defendants-Appellees.

June 12, 1987

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

I.

The appellant in this case, Edward C. Hester, is a member of the International Union of Operating Engineers (IUOE) and its Local 320. He is a crane operator. Local 320 represents Hester and other heavy equipment operators engaged in construction work for employers in northern Alabama, including the Tennessee

Valley Authority (TVA), a corporation wholly owned by the federal government.

Appointments to union jobs with TVA are restricted in two relevant ways. First, IUOE's collective bargaining agreement with TVA contains a provision giving preference in hiring decisions to veterans over non-veterans, and to disabled veterans over non-disabled veterans.[1] Second, IUOE's constitution prohibits a member of one local from working within the jurisdiction of another local without the latter local's consent.[2]

Hester was employed by TVA at its Yellow Creek facility in Iuka, Mississippi, which is within Local 320's jurisdiction. In the summer of 1983, TVA began laying off workers, including Hester, who was replaced by a disabled veteran. Hester, a non-disabled veteran, then asked

---

[1] The section of the agreement governing "Selection for Appointment and Promotion" contains the following:

> Applicants who meet the qualification requirements of a position are considered as follows for appointment. Applicants with status of veteran with a compensable disability of 10 percent or more incurred in military service are appointed first in the order of their qualifications. The remaining applicants considered for appointment are divided into three groups: outstanding, well-qualified, and qualified. Applicants in the "outstanding" group are appointed first, then applicants in the "well-qualified" group, then in the "qualified" group. Within a qualifications group, applicants with veterans' preference are appointed before those without such preference. Among those with veterans' preference, applicants who have status as non-compensable disabled veterans' [sic] are appointed first. Membership in a union affiliated with the Council is a positive factor of merit and efficiency which is considered in determining relative qualifications for appointment.

[2] The "Travel Service Dues" section of IUOE's constitution states that "[m]embers of one Local Union shall not seek employment, be employed, or remain at work at the craft within the territorial jurisdiction of another Local Union without consent of such other Local Union. . . ."

TVA to place his name on its veterans' preferential hiring list.

Soon thereafter, in August of 1983, TVA needed a crane operator at its Brown's Ferry site in Athens, Alabama, which is in the jurisdiction of another local, Local 660.[3] Local 660 referred a non-veteran to TVA from its hiring hall. TVA rejected that candidate and, pursuant to the collective bargaining agreement, looked to the veterans' preferential hiring list. TVA hired Hester.

On September 15, 1983, Local 660 initiated disciplinary proceedings against Hester for working within its jurisdiction without its consent. On November 8, 1983, Hester was found guilty in a Local 660 trial and was fined $3,000. Two days later, Hester appealed his fine to IUOE, which "waived" the fine pending the outcome of his appeal. On August 6, 1984, IUOE denied Hester's appeal but reduced his fine from $3,000 to $500. Local 320 then wrote a letter on September 5, 1984 to Hester explaining that IUOE's constitution would not permit it to accept his membership dues until he paid the $500 fine.[4]

On November 7, 1984, Hester filed suit in the district court against IUOE, Local 320, and Local 660. He alleged three causes of action: (1) the fine that IUOE and Local 660 imposed, and Local 320's refusal to accept his dues, were disciplinary actions in violation of the safeguards against improper disciplinary action provided by the Labor-Management Reporting and Disclosure Act

---

[3] Local 660 represents heavy equipment operators engaged in maintenance, as opposed to construction, work in northern Alabama.

[4] The letter cited the constitution's "Payment of Fines" provision, which includes the following: "Members thirty (30) days in arrears in the payment of fines shall be denied voice and vote in their Local Union, and thereafter until the fine is paid no dues owed by such members can be received or accepted by the Local Union."

(LMRDA), 29 U.S.C. § 411(a)(5) (1982);[5] (2) IUOE breached its duty of fair representation when it affirmed a fine against Hester for exercising his right, under IUOE's collective bargaining agreement with TVA, to receive preference as a veteran; (3) Local 660 violated that collective bargaining agreement when it did not honor the veterans' preference provision. Hester later amended his complaint to add a pendent state law claim based on Alabama contract law.

IUOE, Local 320, and Local 660 each filed motions for summary judgment, asserting that Hester's causes of action were barred by the six-month statute of limitations found in 29 U.S.C. § 160(b) (1982).[6] The district court granted the motions for summary judgment, concluding that "Hester is barred from litigating his claims

---

[5] 29 U.S.C. § 411(a)(5) (1982) states, in full, the following:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

[6] This statute is taken from section 10 of the National Labor Relations Act, which sets forth the National Labor Relations Board's powers to prevent unfair labor practices, and provides as follows:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

29 U.S.C. § 160(b) (1982).

in federal court because this court lacks subject matter jurisdiction." As to Hester's first and third causes of action, the court reasoned that because Hester's employer, an entity of the federal government, "is not subject to the [LMRDA]," 29 U.S.C. § 402(e) (1982), the protections afforded by that Act do not apply to Hester's relationship with his union and its locals; in other words, for the LMRDA to apply to either the employer or the union, both the employer and the union must be subject to the Act. The court similarly dismissed Hester's duty of fair representation claim, concluding that because neither TVA nor IUOE is subject to LMRDA, it would not imply from the Act a duty of fair representation to TVA employees. The court also dismissed Hester's pendent state law claim, in light of its finding that it was without subject matter jurisdiction. As a final matter, the court declined to discuss the statute of limitations defense.

II.

We begin our analysis of whether there is subject matter jurisdiction in this case by examining the Act's design. The Act is a piece of remedial legislation, a major purpose being "to protect union members against possible overreaching by union officials." *In re Gopman*, 531 F.2d 262, 266 (5th Cir.1976) (citation omitted).[7] Fostering union democracy is one way the Act protects union members. By establishing a "bill of rights," the Act guarantees "each union member protection against infringement of his rights to vote, to meet, and to participate in discussions on matters of concern to him and his union." *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir.1967), *cert. denied*, 390 U.S. 989, 88 S.Ct. 1184, 19 L.Ed.2d 1294 (1968). Essential to that protection are

---

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

the due process safeguards the Act provides against improper disciplinary action. *See* 29 U.S.C. § 411(a)(5) (1982).[8]

This design reveals that the focus of the Act is on controversies between a worker and his union, not on the relationship between a union member and his employer. *See Burns v. United Bhd. of Carpenters, Local No. 626*, 204 F.Supp. 599, 601 (D.Del.1962) ("It is abundantly clear that the . . . Act only concerns controversies between a member and the Union to which he belongs."). We believe that the district court's analysis of its subject matter jurisdiction was faulty because it asked whether the employer in this case was subject to the Act, when the Act's bill of rights does not apply to employers. The operative question on which the district court should have focused is whether IUOE and its locals are labor organizations subject to the LMRDA. As we discuss below, that question cannot be resolved solely by determining whether the employer for whom the union member happens to be working satisfies the Act's definition of employer.

A.

"Labor organization" is defined by the LMRDA, 29 U.S.C. § 402(i) (1982), as follows:

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. . . .

One of the components of this definition is that the organization of employees must exist for the purpose of

---

[8] *See supra* note 5.

dealing with employers[9]: "a labor organization is not covered unless it represents, or is chartered to represent, or is actively seeking to represent 'employees' of an 'employer' as these terms are defined in the act." Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va.L.Rev. 195, 199 (1960).[10] The LMRDA expressly excludes, as an "employer," the United States and its corporations, such as the TVA: "'[e]mployer' . . . does not include the United States or any corporation wholly owned by the Government of the United States. . . ." 29 U.S.C. § 402(e) (1982).[11]

Although government-owned corporations are excluded from the definition of employer, we nevertheless read the definition of "labor organization" to include those associations of workers that deal with *any* "employer," as defined by the Act. In other words, labor unions that are "mixed"—unions representing employees working for private employers, as well as employees working for the federal government or government-owned corporations—are "labor organizations," and thus are subject to the LMRDA. *See National Educ. Assoc. v. Marshall*, 100 L.R.R.M. (BNA) 2565, 85 Lab.Cas. (CCH) ¶ 11,172 (D.D.C.1979) [Available on WESTLAW, DCT database] (association consisting mostly of public sector workers is "labor organization" under the LMRDA be-

---

[9] One way in which a labor organization shall be deemed to be engaged in an industry affecting commerce is if it is "recognized or acting as the representative of employees of an employer." 29 U.S.C. § 402(j)(2) (1982).

[10] "Employee" is defined as "any individual employed by an employer." 29 U.S.C. § 402(f) (1982). An "employer" is defined as "any employer or any group or association of employers engaged in an industry affecting commerce" and which is an employer within the meaning of any federal employment law or which deals with any labor organization. 29 U.S.C. § 402(e) (1982).

[11] The LMRDA also excludes state and local governments from the definition of "employer." 29 U.S.C. § 402(e) (1982).

cause it permitted private sector employees to join and represented those employees in negotiations with private employers). Labor unions that exclusively represent employees working for the federal government or government-owned corporations, on the other hand, are not "labor organizations," and thus are not subject to the LMRDA. *See Local 1498, Am. Fed'n of Gov't Employees v. American Fed'n of Gov't Employees*, 522 F.2d 486, 484-90 (3d Cir.1975) (union not subject to LMRDA, because union "limits its membership to, and represents only, federal government employees in their dealings with the federal government"); *New Jersey County & Mun. Council #61, Am. Fed'n of State, County & Mun. Employees v. American Fed'n of State, County & Mun. Employees*, 478 F.2d 1156, 1159 (3d Cir.) ("Public employee unions are not covered by [LMRDA], because . . . these unions are not 'labor organizations' under the Act."), *cert. denied*, 414 U.S. 975, 94 S.Ct. 290, 38 L.Ed. 2d 218 (1973); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va.L.Rev. 195, 200 (1960) ("[A] union exclusively representing or seeking to represent only employees of a . . . governmental employer, is not covered [by LMRDA]."). This interpretation of the statutory definitions is in complete accord with the regulations of the Department of Labor:

> PART 451—LABOR ORGANIZATIONS AS DEFINED IN THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959
>
> * * * *
>
> In defining "employer," section 3(e) expressly excludes the "United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." . . . A labor organization composed entirely of employees of the governmental entities excluded by section 3(e) would not be a labor organization for the purposes

> of the Act. . . . However, in the case of a national or international labor organization composed both of government locals and non-government or mixed locals, the parent organization as well as its mixed and non-government locals would be "labor organizations" and subject to the Act. In such case, the locals which are composed entirely of government employees would not be subject to the Act, although elections in which they participate for national officers or delegates would be so subject.

29 C.F.R. § 451.3(a)(4) (1985) (footnote omitted).

Finally, we find it unlikely that Congress would create a statutory scheme making a labor union subject to the LMRDA only if the particular transaction in question involved a member who was working for a private employer. Congress acted in the public interest to protect workers whose unions are suspectible to corrupt leadership—unions that deal with private employers, to whatever extent, and which are thus afforded power by federal labor law.[12] We know of no case that says a par-

---

[12] The federal statutes making up our nation's private sector labor policy—the Norris-LaGuardia Act, the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act (the LMRDA)—guarantee to employees working for private employers the right to form or join unions and the right to strike. *See* Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-187 (1982). Those statutes also require private employers to bargain collectively with representatives of their employees, namely, union leadership. Government employees, however, are excluded from the protection of those statutes. Beaird, *Labor Relations Policy for Public Employees: A Legal Perspective*, 4 Ga. L. Rev. 110, 115 (1969). The rights to bargain collectively and to use economic weapons to gain concessions from employers create power in the hands of leaders of unions representing private sector employees, power that does not rest in the hands of leaders of public sector unions. We have no reason to believe that when Congress passed the LMRDA to help ensure that union leaders would not abuse their power to the detriment of those they represent, it was any less concerned with regulating the internal affairs of "mixed" unions than with purely private sector

ticular union is a "labor organization" under the LMRDA as to one member, working for the private sector, but not a "labor organization" under the LMRDA as to another member, working for the government.[13]

---

unions. *See National Educ. Assoc. v. Marshall*, 100 L.R.R.M. (BNA) 2565, 85 Lab. Cas. (CCH) ¶ 11,172 (D.D.C. 1979) [Available on WESTLAW, DCT database] (LMRDA's purpose of protecting vital public interests applies to association whose activities with private sector consist of very small fraction of total activities).

One reason Congress excluded purely government unions from coverage by the LMRDA was that those unions did not have the power associated with corrupt leadership. *See* S. Rep. No. 187, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Admin. News 2318, 2391-92 (LMRDA minority report of Senators Goldwater and Dirksen discussing exclusion of federal government from definition of "employer"):

> [Government unions] receive few or none of the benefits under existing labor law, both State and Federal. They are completely excluded from the coverage of the Taft-Hartley Act and thus are denied the rights and benefits extended to members of non-governmental unions . . . .
>
> . . . .
>
> Labor unions of governmental employees such as we have described meet every test of what constitutes a genuinely voluntary, private association. They have no power of any kind, statutory, economic, or otherwise, to compel anyone to join, or their members to remain such. They are completely dependent upon the voluntarily extended support of their members for their continued existence, and must in turn justify such support by the continued service they render their members. Any misconduct, dereliction, or corruption is well guarded against by the right of each member to withdraw from the organization . . . . As a result, corruption, racketeering, gangsterism, find it well nigh impossible to gain a foothold. As a matter of fact, we do not know of a single instance in which these evils have been found to exist in a union of Government employees . . . .

[13] If a union is subject to the LMRDA, then all members, whether employed by the private or public sector, are protected by the Act's bill of rights. Neither the Act's definition of labor organization "member," 29 U.S.C. § 402(*o*) (1982), nor the bill of rights, 29 U.S.C. § 411 (1982), differentiates between public and private sector employees.

B.

Counsel for IUOE candidly acknowledged, in his brief and at oral argument, that IUOE represents private sector employees and has contracts with private sector employers. Local 320 and Local 660 each admitted in answer to Hester's complaint that they represent employees working in private industry. The union, which also represents members who work for the TVA, is thereforce "mixed." Its internal affairs are thus regulated by the LMRDA, even as to its relationship with a member like Hester, who at the time of his dispute with IUOE and the locals was working for a public entity. Accordingly, we find that the district court had subject matter jurisdiction over all of Hester's federal claims.

III.

Because the district court dismissed the case for want of subject matter jurisdiction, it did not reach the question of whether the suit was barred by the applicable statute of limitations. We deem it appropriate to reach this issue of law and conclude that Hester's suit was not time-barred.

Two issues are presented in our examination of the statute of limitations question. First, the parties dispute whether state or federal law provides the substantive limitations period for Hester's claims. Second, we must decide when the applicable limitations period began to run.

A

In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the Supreme Court held that the six-month limitations period in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to "hybrid" section 301 [14] fair/representation claims. The court found that

---

[14] 29 U.S.C. § 185.

section 10(b) provides a "closer analogy" to the federal cause of action than available state statutes, and that federal labor policies are better served by the six-month limitations rule.

In subsequent cases, we have considered whether the principles enunciated in *DelCostello* apply outside of the context of "hybrid" section 301/fair representation claims. In *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir.), *cert. denied*, 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984), we applied the section 10(b) six-month limitations rule where the employee claimed only that his union had breached its duty of fair representation. The plaintiff made no corresponding section 301 claim against the employer. Reasoning by analogy to *DelCostello*, the court concluded that:

> The application of § 10(b) is even more appropriate here than in *DelCostello*. In *DelCostello* the presence of the claim for breach of collective bargaining agreement, which alone would have been governed by a state statute of limitations for suit on a contract, counseled against adoption of the § 10(b) limitations period. The present action, involving only a fair representation claim, which the court in *DelCostello* held analogous to an unfair labor practice both in the right asserted and considerations involved, contains no purely contractual element militating against application of § 10(b)'s six-month period.

Id. at 839.

This court next considered the applicability of *DelCostello* to claims against a union under the LMRDA, 29 U.S.C. § 401, *et seq.*, in *Davis v. UAW*, 765 F.2d 1510 (11th Cir.1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986). The *Davis* court agreed

with three other circuits [15] in holding that the *DelCostello* rationales require that the section 10(b) six-month limitations period apply to a suit against a union alleging violations of the LMRDA's bill of rights, 29 U.S.C. § 411. In addition, *Davis* applied the six-month limitations period retroactively.[16] We are bound by *Davis* [17] and accord-

---

[15] *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984); *Local Union 1397 v. United Steelworkers of Am.*, 748 F.2d 180 (3d Cir. 1984); *Vallone v. Local Union No. 705*, 755 F.2d 520 (7th Cir. 1984).

[16] The *Davis* court explained why it gave retroactive effect to its holding:

> [W]e are bound by our precedent in *Rogers*[*v. Lockheed-Georgia Co.*, 720 F.2d 1247, 1250 (11th Cir. 1983), *cert. denied*, 469 U.S. 916 (1984)], which conclusively determined that the six-month limitations period borrowed from 29 U.S.C. § 160(b) should be applied retroactively in order to further the federal labor policies inherent in the rule and to prevent the inequitable results of different state limitations period being applied to essentially similar federal causes of action.

Davis, 765 F.2d at 1515 n. 14.

[17] Hester argues that we should follow *Sewell v. Grand Lodge of Int'l Assoc. of Machinists*, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972), which borrowed Alabama's one-year statute of limitations period in a suit brought to enforce the protections of 29 U.S.C. § 411 (1982). We cannot look favorably upon *Sewell*, because the analysis in *Davis* was compelled by the intervening Supreme Court decision in *DelCostello*. In any event, a panel of this circuit is not free to overrule a decision of another panel. *Bonner v. City of Prichard*, 661 F.2d 1206, 209 (11th Cir. 1981) (en banc) (prior decisions of Eleventh Circuit (panel or en banc) cannot be "overruled by a panel but only by the court sitting en banc"). Hester also argues that because *DelCostello* was a "hybrid" section 301/fair-representation suit brought by an employee against both his union and his employer, whereas Hester's suit is only against his union, *Davis* can be distinguished. The suit in *Davis* was similar to Hester's action: it was a cause of action filed solely against the union. The court in *Davis* was well aware of the factual distinctions between the suit before it and the "hybrid" one in *DelCostello*. *See Davis*, 765 F.2d at 1512-15. The *Davis* court nevertheless believed that the Supreme Court's policy concerns, as expressed in *DelCostello*, compelled it to

ingly apply the six-month limitations period to Hester's action.

B

Having determined that the section 10(b) six-month limitations period applies, we must determine when the six month period began to run. Although *DelCostello* recognized the possibility that a union member's claim might be tolled during the time he or she continues to seek relief through grievance procedures, the court did not expressly address the issue.[18] In *Erkins*, the court

---

apply the six-month limitation period to "an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." *Davis*, 765 F.2d at 1514 (footnote omitted). Thus, *Davis* cannot reasonably be distinguished from Hester's cause of action.

[18] We respectfully disagree with the dissent's suggestion that the Court's disposition of the two cases involved in the *DelCostello* appeal is contrary to our analysis. The dissent correctly points out that the union members' claims in case No. 81-2408, *see Flowers v. Local 2602, United Steel Workers*, 671 F.2d 87 (2d Cir. 1982), were untimely because the plaintiffs conceded that their union's final action in processing their grievances occurred more than ten months prior to their filing suit. This holding is fully consistent with *Proudfoot* and our conclusion in the instant case. The dissent overlooks, however, the Court's disposition of petitioner DelCostello's claim in case No. 81-2386. *See DelCostello v. International Brotherhood of Teamsters*, 524 F.Supp. 721 (D.Md. 1981), *aff'd mem.*, 679 F.2d 879 (4th Cir. 1982). The Supreme Court noted that "[d]epending on when the joint committee's decision is thought to have been rendered, the suit was filed some seven or eight months afterwards." *DelCostello*, 462 U.S. at 172, 103 S.Ct. at 2294-95. Nevertheless, the Court remanded the case for consideration of whether "certain events operated to toll the running of the statute of limitations until about three months before he filed suit." 462 U.S. at 172, 103 S.Ct. at 2295. The "certain events" discussed by the Court consisted of the union's and the joint committee's decision on DelCostello's letter requesting "reconsideration" of the arbitration decision. *DelCostello*, 524 F.Supp. at 722-23.

The Supreme Court's remand of DelCostello's claims to consider "tolling" exposes the error in the dissent's reasoning. Under the dissent's view that a union member has a cause of action when "the

decided that the employees' claims were barred, but no tolling issue was presented.[19] The *Davis* court discussed

---

union has considered his grievance and taken some action (or inaction) that would inform a reasonable person that the union has not or will not fulfill its duty fairly to prosecute the employee's grievance," *infra* slip opinion at 3169, at ——, there was little doubt that DelCostello had a cause of action more than seven months prior to filing suit. As the district court concluded on remand from the Supreme Court:

> The facts underlying the plaintiff's claims against Anchor and Local 557 were known to the plaintiff when he received notice of the denial of his grievance by the Joint Committee a few days after the July 19, 1977 hearing. At that time he knew his grievance had been denied and the facts indicating his union representative had been inadequate at the July 19, 1977 hearing. That the plaintiff was well aware of his representative's alleged inadequacies before the time of the December 1977 or January 1978 union meeting, the date he alleges his claim arose, is evident from the letter sent in September of 1977 to Union President Mr. O'Connor. In that letter, the plaintiff outlined all of the inadequacies of Mr. Morningstar's representation which he later alleged in his complaint.

DelCostello v. International Brotherhood of Teamsters, 588 F.Supp. 902, 908 (D.Md. 1984), *aff'd*, 762 F.2d 1219 (4th Cir. 1985). Despite the fact that DelCostello had a cause of action under the dissent's standard more than six months prior to filing suit, the Supreme Court remanded the case for the court to consider whether the statute of limitations began to run at some later point in time due to the plaintiffs efforts to secure relief through internal union remedies. The Court's disposition of DelCostello's claim therefore suggests that the dissent is incorrect in arguing that the point at which the statute of limitations begins to run necessarily coincides with the point at which the union member has a cause of action in this context.

[19] Upon expiration of a collective bargaining agreement, the steelworkers union in *Erkins* went on strike. During the ensuing strike, union strike officers allegedly embezzled funds, self dealt, misadvised the union membership on their replacement rights, failed to negotiate a reasonable successor collective bargaining agreement, and unnecessarily prolonged the strike. The NLRB decertified the union. The plaintiff class consisted of former union members who

the difficulty presented in applying the statute of limitations where an employee pursues union grievance proceedings prior to bringing suit:

> We do note a potential problem with applying the six-month limitations period to a suit alleging a violation of § 101 of the LMRDA, 29 U.S.C. § 411. A cause of action under section 411 accrues when the plaintiff union member discovers, or in the exercise of reasonable diligence should have discovered, the act constituting the alleged violations; at which time the statute of limitations begins to run. *See Elkins.* . . . However, section 411(a)(4) provides that a union member may be required to exhaust reasonable internal union procedures for up to four months before proceeding with a suit under section 412. Thus, union members might be forced into a "Catch-22" situation in which they could be barred from suing the union if they wait to sue for more than six months while exhausting union remedies, but could be dismissed from federal court for failure to exhaust internal remedies if they file suit within the limitations period without seeking to exhaust.
>
> *Two possible solutions come to mind. First, the limitations period might be tolled during the time a union member is exhausting his union remedies. Second, a court could require the filing of the lawsuit within six months, but stay the judicial proceedings pending completion of exhaustion of union remedies.*

Davis, 765 F.2d at 1515 n. 13 (citations omitted) (emphasis added). The court concluded, however, that it need not resolve this question because the employee in *Davis* had filed suit approximately eleven months after

---

admitted that they had discovered the alleged fraud and breach of duty almost 11 months prior to bringing suit. No grievance proceedings were involved

he was expelled from the union without ever seeking to exhaust union remedies in the intervening time. *Id.*

The first decision from this circuit to apply the section 10(b) six-month limitations period to a case where a union member pursued union grievance proceedings prior to filing suit was *Proudfoot v. Seafarer's International Union*, 779 F.2d 1558 (11th Cir.1986), *vacating in part*, 767 F.2d 1538 (11th Cir.1985). On reconsideration, the *Proudfoot* court held, in the context of the "hybrid" section 301/fair representation suit, that the section 10(b) six-month limitations period begins to run on the date on which "the employee knew or should have known of the union's final action or the date on which the employee knew or should have known of the employer's final action, whichever occurs later". *Proudfoot*, 779 F.2d at 1559. "Final action" was defined as "the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage." *Id. Proudfoot*, therefore confronted the problem of the conflict presented where a union member seeks to exhaust internal remedies, and adopted the first of the solutions proposed in *Davis*.[20]

---

[20] The district court in *Waring v. International Longshoremen's Association, Local 1414*, 653 F.Supp. 374 (S.D.Ga. 1986), quoted the language from *Davis v. UAW*, 765 F.2d 1510, 1515 n. 13 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986), and concluded that requiring union members to file a lawsuit during the period in which they are pursuing internal union remedies in order to protect their right to sue is "less satisfactory" than a rule tolling the statute of limitations:

> [T]aking into account the waste of judicial resources and plaintiffs' money that would result from forcing all union members to file suit for § 411 violations before exhaustion of internal remedies (and in light of the fact that such a requirement would contravene the federal policy against nonjudicial resolution of labor disputes) the Court holds that so long as a union member is engaged in a good faith attempt to exhaust his internal remedies with respect to a § 411 claim, the six-month period of limitations is tolled.

Id. at 382 (citations omitted). The *Proudfoot* rule is in accord with this standard.

We conclude that the rule announced in *Proudfoot* controls in this case. As we indicated in section III A above, the application of the section 10(b) limitations period to duty of fair representation claims[21] and LMRDA bill of rights claims[22] was compelled by reasoning by analogy to the *DelCostello* decision involving "hybrid" section 301/fair representation claims. We find no sufficient reason for applying the substantive rule of limitations from the "hybrid" suit context without also accepting the rule for when that substantive limitations period begins to run.[23]

Irrespective of whether a union member may be *required* by the union or by the courts to pursue union grievance proceedings prior to seeking to vindicate LMRDA

---

[21] *Erkins v. United Steelworkers of America*, 723 F.2d 837 (11th Cir.), *cert. denied*, 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984).

[22] *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986).

[23] We are not persuaded by the dissent's arguments as to why differences between "hybrid" claims and § 411 claims requires that a different statute of limitations rule apply. For example, the dissent fails to explain why a fair representation claim against the union alone, without a corresponding claim against the employer, should be governed by a different statute of limitations rule. The dissent concedes that the dual claims in a "hybrid" suit are "inextricably interdependent," and that "the alleged violation that serves as the key to the employee's lawsuit is the union's alleged wrong, not the underlying breach of the collective-bargaining agreement by the employer." In both situations, a union member might learn that his or her union has inadequately represented his or her interests; but the breach of duty may be mooted by subsequent proceedings. In both situations, the union member might be said to have a cause of action prior to the union's final action, but *Proudfoot* recognized that policy considerations favor tolling the statute of limitations until grievance proceedings are exhausted or otherwise break down to the employee's disadvantage.

rights in court,[24] applying the *Proudfoot* rule in this context is consistent with federal labor policy. "Hybrid"

---

[24] 29 U.S.C. § 411(a)(4) limits the extent to which unions may require members to exhaust internal grievance procedures prior to seeking judicial relief. The provision, entitled "Protection of right to sue," states that:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . .

Section 411(a)(4) does not itself impose an obligation on a union member to exhaust his or her union remedies. *See Rizzuto v. Western Conference of Teamsters Pension Trust*, 573 F.2d 552, 554 (9th Cir. 1977). Instead, it merely operates to limit any exhaustion requirement that a union chooses to include in its constitution: the provision permits a union to require that members resort to internal remedies, but only for a period of up to four months. *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968). The *Industrial Union* Court construed the provision as permitting a district court, in its discretion, to stay a union member's action until union remedies have been exhausted or unsuccessfully sought, but only for a period of up to four months. 391 U.S. at 428, 88 S.Ct. at 1724. *See also Chapa v. Local 18*, 737 F.2d 929, 931 (11th Cir. 1984); *Keene v. International Union of Operating Engineers*, 569 F.2d 1375, 1379 (5th Cir. 1978). In exercising its discretion to determine whether to grant a stay to permit up to four months of exhaustion of union remedies, the district court:

> [M]ust determine "whether the available [union] procedures are adequate and reasonable in light of the facts of the particular case." *NLRB v. Marine Workers*, 391 U.S. 418, 428, 88 S.Ct. 1717, 1723, 20 L.Ed.2d 706 (1968). At least three factors are relevant in this inquiry:
>
> > first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks . . .; and third, whether exhaustion of internal procedures

section 301/fair representation claims place two major labor policies in conflict with internal grievance procedures are involved.[25] The traditional purpose of allowing exhaustion is to encourage private rather than judicial resolution of disputes. *Clayton v. International Union, UAW*, 451 U.S. 679, 689, 101 S.Ct. 2088, 2095, 68 L.Ed.2d 538 (1981). On the other hand, *DelCostello* refused to apply a limitations period longer than six months because doing so would preclude the relatively rapid final resolution of labor disputes favored by federal law. *DelCostello*, 462 U.S. at 168, 103 S.Ct. at 2292. *Proudfoot* resolved this tension by construing the section 10(b) limitations rule in a manner that permits a union member to exhaust available internal remedies without foreclosing his right or her right, in the event that this remedy proves ineffective, to seek relief in federal court. This construction has even greater applicability to appellant's action because "the national interests in stable labor-management bargaining relationships and the

---

would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

Clayton v. International Union, UAW, 451 U.S. 679, 689, 101 S.Ct. 2088, 2095, 68 L.Ed.2d 538 (1981).

Davis v. UAW, 765 F.2d 1510, 1512 n. 4 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986).

In Hester's case, the IUOE does impose an exhaustion requirement on its members who seek redress for grievances with the union. IUOE's constitution contains a section entitled "All Court Actions Superseded," which provides that "[n]o suit . . . shall be brought in any court . . . by any member . . . until and unless all rights, remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member . . . complaining." This exhaustion provision is consistent with the time limitation imposed by section 411(a)(4) because the provision states that it "shall only require resort to internal remedies for a period not exceeding four (4) months." We need not decide if there were appropriate circumstances in this case that would have allowed the district court to "hear and decide" the case before the four-month period elapsed.

[25] *See Frandsen v. Brotherhood of Ry., Airline & S.S. Clerks*, 782 F.2d 674, 678 (7th Cir. 1986).

speedy, final resolution of disputes under a collective bargaining agreement are not implicated [in an action under 29 U.S.C. § 411]." *Davis*, 765 F.2d at 1514.[26] Accordingly, the policy favoring encouragement of private resolution of labor disputes supports our conclusion that we should not deviate from the *Proudfoot* rule in the context of a suit under section 411.

Application of the *Proudfoot* rule also avoids the waste of litigant and judicial resources endorsed by the dissent

---

[26] The Sixth Circuit's decision in *Dunleavy v. Steelworkers Local 1617*, 814 F.2d 1087 (6th Cir. 1987), supports our analysis. The *Dunleavy* court discussed two conflicting policies that bear on the issue of when the statute of limitations on an LMRDA claim begins to run:

> On the one hand, there exists the important national policy favoring a swift and uniform resolution of labor disputes. This is the same policy that is at the heart of the imposition of the relatively brief six-month time limit borrowed from Section 10(b) of the NLRA. On the other hand is the policy embodied in the exhaustion doctrine which encourages the self-governance of labor organizations through the development of internal procedures, providing an avenue for redress of grievances for its members. This is the policy that we think speaks the louder in the present case.
>
> Through the policy of exhaustion, unions are afforded the initial opportunity to correct their own internal problems through self-regulation and are encouraged to be responsible for their own actions. Prior union action may assist the court in resolving the controversy that may eventually come before it by interpreting union rules and defining or redefining the issues. The need for self-governance is most clearly in focus where, as in the present case, the complaint alleges wrongdoing in internal union affairs.

Id. at 1089-90. (citations omitted). The court therefore agreed with Judge Edenfield's holding in *Waring v. International Longshoremen's Association Local 1414*, 653 F.Supp. 374 (S.D.Ga 1986), that the statute of limitations is tolled during the period in which a union member engaged in a good faith attempts to exhaust internal union remedies.

in this case.[27] As the Sixth Circuit explained in *Dunleavy v. Steelworkers Local 1617*, 814 F.2d 1087 (6th Cir.1987):

---

[27] The dissent's rule uses the statute of limitations to force union members to file fragmentary claims in order to protect their right to sue in the event that they should eventually desire to do so. Due to the fact that the dissent views the statute of limitations on Hester's cause of action against Local 660 as having begun to run on October 7, 1983, when Hester wrote to Local 660 denying the Local's charges and alleging that the Local violated the requirement that union members be given written specific charges, § 411(a)(5), prior to being fined or otherwise disciplined, Hester would have to have filed suit by April 7, 1984, in order to preserve his claims against Local 660. The dissent concedes, however, that Hester did not have a claim against either Local 320 or the IUOE until well after that date. Under the dissent's scheme, therefore, Hester had to file his claim in federal court against Local 660 prior to April 7, 1984, alleging a violation of his § 411(a)(5) right to specific written charges.

Hester's rights under § 411(a)(5) might also have been violated, however, if he were fined or otherwise disciplined without being afforded "a reasonable time to prepare his defense," § 411(a)(5)(B), or "a full and fair hearing." § 411(a)(5)(C). Hester could not, of course, have known whether these rights would be violated until the proceedings moved forward beyond his mere receipt of the charges. If any such violation occurred, the dissent would require Hester to attempt to amend his complaint or file a new action to allege violations of these rights. In the meantime, the district court would have to decide whether to stay the proceeding, see *supra* note 24, for up to four months to honor a contractual exhaustion requirement, or to go forward even though the union grievance proceedings might settle the entire controversy. A similar higgledy-piggledy situation would occur with respect to the duty of fair representation claims. Hester would then, under the dissent's scheme, have had to file another action or amend his complaint to join Local 320 as a defendant when Local 320 advised Hester on September 5, 1984 that it would not accept his membership dues until he paid the fine imposed by Local 660. Hester would have had to amend his complaint again or file another action against the IUOE when it denied his appeal on August 6, 1984. The *Proudfoot* court wisely rejected such an untenable statute of limitations rule.

> The Union's position would seem to require one placed in [the union member's] situation to file a lawsuit which would become superfluous in the event of favorable Convention action simply as a matter of protection. In addition to other practical objections to such filings, we feel constrained to point out that we would be loath to require further cluttering up the docket of the overburdened federal judicial system for such a contingent purpose.

Id. at 1097. The *Proudfoot* rule avoids this waste of resources by allowing a union member to seek relief through union grievance procedures without foreclosing his or her right to sue in the event that these procedures prove ineffective.

Applying *Proudfoot* to the facts of this case, the timeliness of Hester's suit depends upon the date upon which Hester knew or should have known of the unions' final action. Final action is defined as the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage. *Proudfoot*, 779 F.2d at 1559. Here, there is no question that Hester learned of the unions' final action when the IUOE notified Hester that his appeal was denied on August 6, 1984. Hester filed suit three months later. We therefore conclude that none of his federal claims are barred by the statute of limitations.

We reverse the judgment of the district court and remand the case to the district court for further proceedings.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the district court had subject matter jurisdiction over this case and concur in Parts I and II of the majority's opinion. I also agree with the majority that we are bound by *Davis v. United Auto., Aerospace & Agric. Implement Workers*, 765 F.2d 1510 (11th Cir.1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986), which applied the six-month limitations period found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), to a suit brought by a union member against his union pursuant to section 102 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 412 (1982),[1] alleging violations of LMRDA's bill of rights, 29 U.S.C. § 411 (1982).[2] As to the majority's analysis, in Part III.B., of when the six-months limitations period begins to run, I must respectfully dissent.

---

[1] 29 U.S.C. § 412 (1982) states the following:

> § 412. Civil action for infringement of rights; jurisdiction
>
> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

[2] 29 U.S.C. § 411(a)(5) (1982), which is the portion of LMRDA's "bill of rights" pertinent to this appeal, states the following:

> (5) Safeguards against improper disciplinary action
>
> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

In this section 411 bill-of-rights suit brought by a union member against his union, the majority has mechanically applied the test of when a cause of action accrues—and therefore of when the limitations period begins to run—in a hybrid section 301[3]/fair representation suit brought by an employee against both his employer and his union. In a hybrid suit, the employee's causes of action against his employer and his union do not accrue until the dispute resolution process established by the collective bargaining agreement has been exhausted, or the union has decided to abandon the employee's grievance; only when one of these events occurs can the employee know whether he has been injured by his employer as a result of his union's failure fairly to represent him. In a bill-of-rights suit, as the Supreme Court and numerous courts of appeals have acknowledged, the union member has a cause of action against his union at the moment he learns that his union has infringed a right guaranteed him by LMRDA's bill of rights. *See, e.g., NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426, 88 S.Ct. 1717, 1723, 20 L.Ed.2d 706 (1986); *Chadwick v. International Bhd. of Elec. Workers*, 674 F.2d 939, 941-42 (D.C.Cir. 1982) (per curiam). By applying the hybrid suit test to a bill-of-rights suit, the majority not only ignores this precedent; it unfairly forbids the union member from bringing his suit until he has "exhausted" his internal union remedies (as provided by the union constitution), however long that may take. The majority's error becomes clear when one examines and compares the nature of a hybrid suit, and how and when its causes of action accrue for statute of limitations purposes, with the nature of a bill-of-rights suit, and how and when its cause of action accrues.

---

[3] Section 301 of LMRDA governs "[s]uits by and against labor organizations" and is codified at 29 U.S.C. § 185 (1982).

I.

A.

The hybrid suit stems from an employee's grievance against his employer that the union has failed to resolve to the employee's satisfaction. In such a suit, the employee contends that he did not prevail against his employer because the union failed to prosecute his grievance in proper fashion through the dispute resolution mechanism provided in the collective-bargaining agreement.

The union has an affirmative duty to represent its members fairly. *See, e.g., International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 46 n. 8, 99 S.Ct. 2121, 2125 n. 8, 60 L.Ed.2d 698 (1979) ("The duty of fair representation is . . . implicit in the National Labor Relations Act."). In the context of a member's grievance with the employer, "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca v. Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 917, 17 L.Ed.2d 842 (1967). In policing union conduct that is "arbitrary and perfunctory" courts have been willing

> to look beyond the question whether the union in fact pursues an employee's grievance (contractual or statutory) and to determine whether the union has made a full investigation, has given the grievant notice and an opportunity to participate, has mustered colorable arguments and has refuted insubstantial arguments by the employer.

R. Gorman, *Labor Law* 718 (1976).

Unions occasionally fail to fulfill this duty of fair representation. The Supreme Court has thus recognized that when an employee has a dispute with the employer, the federal labor policy of requiring exhaustion of any grievance or arbitration remedies provided in the collective-bargaining agreement "works an unacceptable

injustice when the union representing the employee in the grievance-arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164, 103 S.Ct. 2281, 2290, 76 L.Ed.2d 476 (1983). In those instances, when a union breaches its duty to represent fairly one of its members who alleges the employer wronged him, the "employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *Id.* (citations omitted).

Justice Stewart, concurring in the judgment, explained the practicalities of such a hybrid suit in *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 66-69, 101 S.Ct. 1559, 1565-67, 67 L.Ed.2d 732 (1981).[4] A hybrid suit consists of two distinct claims, each with its own jurisdictional basis. The cause of action against the employer rests on section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982); the employee is alleging a breach of the collective-bargaining agreement. The cause of action against the union rests on the union's duty of fair representation, implied from the National Labor Relations Act, 29 U.S.C. § 151-170 (1982 & Supp. III 1985); the employee is alleging that the union breached its duty to process properly his grievance with the employer. *Mitchell*, 451 U.S. at 67, 101 S.Ct. at 1566 (Stewart, J., concurring in the judgment) (citation omitted); *see also DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290. In short, the hybrid section 301/fair representation suit, or "claim," amounts to "a direct challenge to 'the private settlement of disputes under [the collective-bargaining agreement.]' " *Mitchell*, 451 U.S. at 66, 101 S.Ct. at 1566 (Stewart, J.,

---

[4] In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the full Court adopted Justice Stewart's analysis of the hybrid suit and his view that the federal limitations period of section 10(b) applies to those suits.

concurring in the judgment) (citation omitted); *see also DelCostello*, 462 U.S. at 165, 103 S.Ct. at 2291.

Although there are two distinct claims making up a hybrid suit, those claims are "inextricably interdependent." *Mitchell*, 451 U.S. at 66-67, 101 S.Ct. at 1566 (Stewart, J., concurring in the judgment); *see also DelCostello*, 462 U.S. at 164-65, 103 S.Ct. at 2291. A hybrid suit is an all or nothing proposition: either the union member prevails against both the employer and the union, or he loses against both. In other words, "[t]o prevail against either the company or the Union, [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231 (1976), *quoted in Mitchell*, 451 U.S. at 67, 101 S.Ct. at 1566 (Stewart, J., concurring in the judgment) *and DelCostello*, 462 U.S. at 165, 103 S.Ct. at 2291 As a practical matter, an allegedly aggrieved employee's success against his employer turns on whether he can first show that his union wronged him in processing his grievance.

Initially, the employee must show that the union did not fairly represent him; for example, the union may have processed the grievance in a poor or perfunctory fashion, or the union may have simply taken no action to assist the employee. If the employee can show that the union breached its duty of fair representation, he must then show that had the union properly processed his grievance, he would have prevailed against the employer, i.e., the employer somehow breached the collective-bargaining agreement in its treatment of the employee. If the employee cannot show that the union breached its duty of fair representation (either for lack of evidence or because the union acted properly), then the employee will not be heard to complain against the employer. *See Smith v. Babcock & Wilcox Co.*, 726 F.2d 1562, 1564 (11th Cir.

1984) (per curiam) ("The indispensable predicate for a § 301 action . . . is a showing that the union has breached its statutory duty of fair representation.") (citation omitted). If, for example, the union acted properly in representing the employee, and the employee lost in all stages of the grievance or arbitration proceedings prescribed in the collective-bargaining agreement, a court will not relitigate the case against the employer, even if it appears that the employee should have prevailed against the employer.

In theory, an employee does not have to sue both the union and the employer. The employee may sue only one, "but the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 462 U.S. at 165, 103 S.Ct. at 2291. In short, the case the employee must prove reduces to this proposition: "a plaintiff[-employee] must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer." *Mitchell*, 451 U.S. at 67, 101 S.Ct. at 1566 (Stewart, J., concurring in the judgment). Moreover, because "the duty of fair representation is 'part and parcel of [the] § 301 claim],'" *id.* at 69, 101 S.Ct. at 1567 (citation omitted), "[w]hen the 6-month period of § 10(b) has passed, the employee should no longer be able to challenge the alleged breach of duty by his union, and as this is a precondition for maintaining the contract action, he should not be able to challenge the employer's action either," *id.* (footnote omitted).

The majority states that the *DelCostello* Court did not decide when the section 10(b) six-month limitation period begins to run in a hybrid section 301/fair representation suit. *Ante* slip opinion at 3160, at ——.[5] On the con-

[5] The same statement was made by our court in *Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558, 1559 (11th Cir. 1986): "The Court in *DelCostello* did not decide when the six-month period begins to run."

trary, the Court's disposition of employee DelCostello's case indicates that the Court must have decided, even if implicitly, that the limitations period began to run when the regional joint union-management committee rendered its decision concerning the employee's grievance. *See DelCostello*, 462 U.S. at 155, 172, 103 S.Ct. at 2285-86, 2294-95. There was no doubt that DelCostello's suit was filed more than six months after the committee's decision, which under the collective-bargaining agreement was final and binding on all parties. *See id.* at 172, 103 S.Ct. at 2294-95. The only reason the Supreme Court remanded the case for further proceedings was because DelCostello had raised a tolling issue that the district court had expressly declined to consider. *See id.* at 172, 103 S.Ct. at 2291.

In sum, *DelCostello* teaches that the hybrid suit should be viewed as two causes of action that accrue simultaneously and that the statute of limitations begins to run at the time of accrual. *See id.* at 163-65, 172, 103 S.Ct. at 2290-91; 2294-95; *see also Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558, 1559 (11th Cir. 1986).[6] More specifically, the limitations period on a hybrid suit normally begins to run when two events take place: (1) the dispute resolution process of the collective-bargaining agreement has been fully exhausted or the union has decided to abandon the aggrieved employee's cause at some point during that process,[7] and (2) the

---

[6] This analysis of the hybrid suit avoids a dilemma that could otherwise frustrate an employee who has been wronged by both his employer and his union: an employee with a grievance against his employer may be prevented from repairing to federal court by the collective bargaining agreement, but when he is excused, possibly months later, from pursuing his contractual remedial rights because his union failed to represent him fairly, his hybrid suit may be barred by the statute of limitations.

[7] The facts in *DelCostello* presented the first of these two situations: the union prosecuted the employee's grievance to a conclusion, utilizing the entire dispute resolution process. The employee

aggrieved employee receives notice of that fact. Our decision in *Proudfoot* recognizes that these two events signal the commencement of the limitations period. *Proudfoot*, 779 F.2d at 1559.

In examining the second event, we have said that section 10(b)'s six-month limitations period commences when the employee receives notice of facts that would lead a reasonable person to believe that his union has engaged in acts constituting a violation of his right to fair representation. *See Proudfoot*, 779 F.2d at 1559 (citing *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984)); *see also Davis v. United Auto. Aerospace & Agric. Implement Workers*, 765 F.2d 1510, 1515 n. 13 (11th Cir.1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986); *Erkins v. United Steelworkers*, 723 F.2d 837, 839 (11th Cir.), *cert. denied*, 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984). In other words, an aggrieved employee cannot be charged with notice that his union has breached its duty of fair representation until the union has considered his grievance and taken some action (or inaction) that would inform a reasonable person that the union has not or will not fulfill its duty fairly to prosecute the employee's grievance. When the union has elected to pursue the dispute resolution process of the collective-bargaining agreement, the employee cannot know whether his union's conduct has constituted a breach of the duty of fair representation until the process is completed and he has lost his case. If the employee believes that he would have prevailed had the union properly performed its duty, he has

---

did not prevail, and when he received notice of this fact his cause of action accrued and the statute of limitations period began to run. Though the Supreme Court was not faced with the second situation posed in the text—whether the employee's cause of action accrues, and the limitations period begins to run, when the employee receives notice that the union has deceided to abandon his grievance—I believe that the Court, given its analysis of the hybrid suit, would reach the conclusion I reach in the text.

six months to bring his suit.[8] When the union decides not to prosecute the employee's grievance or, having begun the prosecution, decides to abandon it, the employee's cause of action begins to run at the moment the union notifies the employee of its decision.[9]

Having described the nature of a hybrid cause of action, and how and when it accrues for statute of limitations purposes, I now discuss the nature of a section 411 bill-of-rights suit, such as the one Hester has brought, instituted by a union member against his union, and how and when it accrues for statute of limitations purposes.

B.

In this case, Hester brought three separate causes of action, one each against the International Union of Oper-

---

[8] If the grievance procedure has made the employee whole, the employee could not possibly have a cause of action against his union (or his employer), even if the union failed to exercise due care in prosecuting his grievance.

[9] In *Proudfoot*, this circuit measured the timeliness of a hybrid suit "from the date on which the employee knew or should have known of the union's final action or the date on which the employee knew or should have known of the employer's final action, whichever occurs later." *Proudfoot*, 779 F.2d at 1559. The court defined "final action" as "the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage." *Id.* The *Proudfoot* court's measurement of the timeliness of a hybrid suit strikes me as being a bit odd because the allegations of a hybrid suit are, first, that the employer wronged the employee in violation of the collective-bargaining agreement and, second, that the union wronged the employee because it did not represent him fairly in his grievance with the employer. The union's "final action" always occurs after the employer's "final action." Thus, it is not necessary to consider when the employer breached its contract with the employee. The limitations period should begin to run when the grievance procedure has been exhausted or otherwise has broken down to the employee's disadvantage. At that point, the employee should know whether his union handled his grievance fairly.

ating Engineers (IUOE) and two of its locals, pursuant to 29 U.S.C. § 412 (1982). That section gives a union member the right to sue his union for violating rights secured by LMRDA's bill of rights, 29 U.S.C. § 411 (1982).

Local 660's conduct in disciplining Hester provided the basis for each of Hester's causes of action. Hester alleged that Local 660 fined him $3,000 for exercising his rights under the collective-bargaining agreement with his employer, but did so without serving him with a written charge, as required by LMRDA, 29 U.S.C. § 411(a)(5)(A) (1982),[10] specifying precisely how his employment in Local 660's jurisdiction had violated union rules. Hester alleged that IUOE also violated section 411(a)(5)(A) when it approved Local 660's action by summarily denying his appeal.[11] Hester alleged that Local 320 thereafter violated section 411(a)(5)(A) when, on the basis of Local 660 and IUOE's unlawful disciplinary action, it refused to accept his union dues until he paid the fine imposed by Local 660, which IUOE had reduced from $3,000 to $500.[12]

---

[10] *See supra* note 2.

[11] In addition to bringing a bill-of-rights claim against IUOE, Hester alleged that IUOE breached its duty of fair representation when it affirmed a fine against him for exercising his right, under IUOE's collective bargaining agreement with TVA, to receive preference as a veteran. Clearly, Hester did not have a "fair representation" claim.

The duty of fair representation arises when the employee has a dispute with his employer and turns to his union for assistance and representation in pursuing the grievance procedures outlined in the collective-bargaining agreement. *See supra* text accompanying notes 4-5. Hester had no dispute with his employer and never sought union assistance to process a grievance under the collective bargaining agreement. Rather than a fair representation claim, Hester's claim against IUOE is that it ratified Local 660's illegal action by summarily denying his appeal.

[12] These allegations make it clear that Hester's suit is not a hybrid one. He had no dispute with his employer, the Tennessee

As noted above, the three discrete LMRDA violations that Hester described in his complaint all arose out of the disciplinary action that Local 660 initiated against him. In a letter dated September 16, 1983, Local 660 charged Hester with violating IUOE's constitution by accepting employment in Local 660's jurisdiction without its consent, and with violating its trade rules. The letter also informed Hester that Local 660 had initiated disciplinary proceedings against him. In a letter dated October 7, 1983, Hester readily acknowledged that he had worked in Local 660's jurisdiction without its consent but denied that he had done anything wrong; he said that all he had done was to exercise his right to receive preference as a veteran, and that "[t]he union consented to veterans' preference when it signed the contract with TVA." In addition, he protested that Local 660's charge against him was not specific, as required by LMRDA's bill of rights, 29 U.S.C. § 411(a)(5)(A) (1982), in that it failed to state how he had violated Local 660's trade rules.

Obviously, by October 7, 1983, Hester had concluded that Local 660 was proceeding against him in violation of LMRDA's bill of rights. On that date, he had an absolute right to file suit in the district court against Local 660; he did not have to await the outcome of the union's disciplinary proceeding. *See Chadwick v. International Bd. of Elec. Workers*, 674 F.2d 939, 941-42 (D.C.Cir.1982) (per curiam) ("The district court's jurisdiction was absolutely unaffected by [the union member's] alleged failure to exhaust his internal remedies. . . .) (discussing *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 88 S.Ct. 1717,

---

Valley Authority (TVA). In fact, TVA did exactly what Hester wanted it to do: it placed Hester's name on its veterans' preferential hiring list and, citing the collective bargaining agreement's provision giving preference in hiring to veterans over non-veterans, hired Hester to work at its Brown's Ferry site.

20 L.Ed.2d 706 (1968)); *see also infra* note 14 (concerning power of district court to stay suit for up to four months to enable union to complete its disciplinary proceeding).

Although Hester had an absolute right to sue Local 660 at any time during the six months following October 7, 1983, the majority would have denied him that right because Local 660's disciplinary proceeding against him had not been concluded. According to the majority, Hester had to participate in that proceeding, even if unlawful, and if disciplined, had to exhaust his appeal to IUOE. As it turned out, this disciplinary process was not concluded until August 6, 1984, when IUOE notified Hester that it had denied his appeal. At this point, the majority holds, Hester's causes of action against Local 660 and IUOE accrued and the statute of limitations began to run. The majority does not state when Hester's cause of action against Local 320 accrued; presumably, it accrued on September 5, 1984, when Local 320 suspended his membership pending payment of his fine to Local 660.[13]

C.

As my discussion indicates, Hester had an absolute right to sue IUOE, Local 660, and Local 320 at the moment each of them violated LMRDA's bill of rights. The statute of limitations began to run as to each of these defendants on the day Hester received notice of its LMRDA violation. As of at least October 7, 1983—the day Hester wrote to Local 660—he was on notice that Local 660 had instituted disciplinary action in violation of his right, under section 411(a)(5)(A), to be "served

[13] On September 5, 1984—a month after IUOE denied his appeal—Hester's own Local 320 wrote him a letter explaining that IUOE's constitution would not permit it to accept his membership dues until he paid the $500 fine. The majority does not state, or even intimate, when Hester's cause of action against Local 320 accrued or when the statute of limitations on that action began to run.

with written specific charges." Hester did not bring suit against Local 660 in the district court, however, until November 7, 1984, well after the six-month statute of limitations had run. Hester's federal claim against Local 660 is therefore time-barred.[14]

---

[14] Some may argue that the six-month statute of limitations period is tolled during the four-month period of 29 U.S.C. § 411(a)(4) (1982), which limits the extent to which unions and district courts may require members to exhaust internal grievance procedures before they litigate the merits of their claims:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof. . . .

The Supreme Court interpreted this provision in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426, 88 S.Ct. 1717, 1723, 20 L.Ed.2d 706 (1968), a case in which the Court ordered enforcement of an NLRB remedial order in favor of a union member who had been expelled from his union for having filed charges against his union before exhausting the internal remedies offered by the union's constitution. The Court wrote the following of section 411(a)(4):

> We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union.

Id. Section 411(a)(4) thus "does not establish a jurisdictional bar to judicial review that may be invoked by union defendants, but simply preserves the discretionary exhaustion doctrine that allowed courts to determine whether pursuit of internal remedies should be required in a given case even before the LMRDA was enacted." *Chadwick v. International Bhd. of Elec. Workers*, 674 F.2d 939, 942 (D.C. Cir. 1982) (per curiam) (citations omitted); *see also Clayton v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 451 U.S. 679, 689, 101 S.Ct. 2088, 2095, 68 L.Ed.2d 538 (1981) (listing factors district courts should con-

As to Hester's cause of action against IUOE, the timeliness of his suit depends upon the date on which Hester received notice of its LMRDA violation, i.e., August 6, 1984 (or soon thereafter), when IUOE denied Hester's appeal. As to Hester's cause of action against his own Local 320, the timeliness of his suit depends upon the date on which Hester received notice of its LMRDA violation, i.e., September 5, 1984 (or soon thereafter), when Local 320 wrote a letter to Hester explaining that IUOE's constitution would not permit it to accept his membership dues until he paid the fine. Hester brought suit in the district court against both IUOE and Local

---

sider when deciding whether to require exhaustion of internal union procedures); *ante* 3163 slip opinion at n.24, at —— n.24.

Although Congress provided in section 411(a)(4) that unions and district courts may require resort to union remedies for a four-month period, it notably did not require complete exhaustion, when it could easily have done so. Thus, in my view, there is no legitimate basis, consistent with congressional intent, for using section 411(a)(4) to toll the limitations period during the four-month period.

Even assuming that as to Hester's federal claim against Local 660 the limitations period was tolled for four months, that claim would remain time-barred. Hester did not file his suit against Local 660 until seven months after the statute of limitations had already run. An additional four months during which to file suit could not have rendered Hester's suit against Local 660 timely.

Some might view this result—Hester's federal claim against Local 660 is time-barred—as harsh because Hester filed his suit before *Davis v. United Auto., Aerospace & Agric. Implement Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1284, 89 L.Ed.2d 592 (1986), was handed down and within what Hester thought was the applicable statute of limitations. *See ante* slip opinion at 3160 n.17, at —— n.17. Hester's trouble with Local 660, however, did not begin until several months after the Supreme Court decided *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), a case that not only foreshadowed *Davis*, but compelled it. In any event, I believe that we are bound to reach this result by the precedent of the Supreme Court and of this circuit.

320 on November 7, 1984, well before the six-month statute of limitations had run for Hester's causes of action against IUOE and Local 320. In sum, Hester's federal claims are time-barred as against Local 660, but not as against IUOE or Local 320.

Instead of adopting a rule whereby the limitations period starts running when the union member's cause of action accrues—i.e., on the day he receives notice of his union's LMRDA violation—the majority has said, contrary to Supreme Court precedent, that the limitations period starts running when the union member receives notice that the union's internal dispute resolution procedures (as found in the union constitution) have been exhausted. The majority derives this "exhaustion" rule from the inapposite observations in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), and in *Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558 (11th Cir.1986), that the cause of action in a hybrid section 301/fair representation suit cannot accrue until either the dispute resolution process of the collective-bargaining agreement has been fully exhausted or the union has decided to abandon the aggrieved employee's cause at some point during that process.[15] By doing so, the majority simply fails to recognize the difference between a hybrid suit and a section 411 bill-of-rights suit.

A hybrid suit is based on the union's failure properly to represent the employee in his grievance with his employer; thus, exhaustion (or a breakdown) of the griev-

---

[15] The majority has taken the *Proudfoot* language discussing when a cause of action accrues in a hybrid suit, *Proudfoot*, 779 F.2d at 1559, and applied it in the dissimilar context of a bill-of-rights suit brought by a union member against his union: "Applying *Proudfoot* to the facts of this case, the timeliness of Hester's suit depends upon the date upon which Hester knew or should have known of the union's final action." *Ante* slip opinion at 3165, at ——.

ance procedure must occur before the hybrid suit's causes of action can accrue. In contrast, a section 411 bill-of-rights suit, which is based on a union's denial of a member's LMRDA rights, does not require exhaustion of internal union dispute resolution procedures. The majority's rule is thus not only barred by Supreme Court and lower court precedent, *see e.g., NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 421-28, 88 S.Ct. 1717, 1720-24, 20 L.Ed.2d 706 (1968) (whether district court should stay union member's suit pending exhaustion of internal union remedies is within sound discretion of district court); *Chadwick v. International Bhd. of Elec. Workers*, 674 F.2d 939, 941-42 (D.C.Cir.1982) (per curiam) (district court's jurisdiction unaffected by union member's failure to exhaust internal union remedies), but it also relies on inapposite authority for support.

Furthermore, the majority's analytical approach is unsound. The majority acknowledges, *ante* slip opinion at 3163 n. 24 at —— n. 24, that section 411(a)(4)[16] does not prevent a union member from filing suit against his union, although the district court may stay the action for a period of four months while union remedies are being exhausted, *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426, 88 S.Ct. 1717, 1723, 20 L.Ed.2d 706 (1968). Presumably, the majority would also acknowledge that "[i]n appropriate circumstances, it is now well established that a district court can properly hear and decide a case [brought by a union member against the union] before the [four-month period of section 411(a)(4)] elapses." *Semancik v. United Mine Workers Dist. #5*, 466 F.2d 144, 150 (3d Cir. 1972) (citations omitted); *see also Industrial Union*, 391 U.S. at 428, 88 S.Ct. at 1724 (in spite of Section 411(a)(4), "a court or agency might consider whether a particular procedure was 'reasonable' and entertain the

[16] *See supra* note 14.

complaint even though those procedures had not been 'exhausted' "); *Chapa v. Local 18, Indus. Union of Marine & Shipbuilding Workers*, 737 F.2d 929, 931 (11th Cir.1984) (["Section 411(a)(4)] provides that a union 'may' require its members to exhaust reasonable internal hearing procedures before seeking court intervention, however the decision to enforce such a requirement in a particular case is within the sound discretion of the district court.") (citations omitted). What disturbs me is that the majority does not explain how a union member whose union violates his section 411 bill of rights can file suit in district court—and in appropriate circumstances have his claims decided—before exhaustion of internal union remedies, when, according to the majority's analysis, the union member does not even *have* a cause of action until the union has taken "final action," i.e., when *all* internal union grievance procedures have been exhausted. Only when the union has taken final action, the majority suggests, does the union member have a cause of action; that is the point at which the majority has said the limitations period begins to run.

The majority has created a strange scheme: if the union member who has been wronged by his union does not file suit in district court before exhaustion of internal remedies, his cause of action does not accrue, and the limitations period does not begin to run, until exhaustion. On the other hand, under the majority's theory, if the union member who has been wronged by his union does file suit in district court before exhaustion of internal remedies, his cause of action has accrued, and, under appropriate circumstances, the district court can decide the case. I cannot imagine that Congress intended this non sequitur. Moreover, I do not see how the majority's scheme is consistent with any policy underlying our federal labor laws.[17]

---

[17] The majority states the following: "We find no sufficient reason for applying the substantive rule of limitations from the

II.

I agree that the district court had subject matter jurisdiction over this case for the reasons given in the majority's opinion. Nevertheless, I would affirm the district court as to its disposition of Hester's federal claim against Local 660 because that claim is time-barred. I would reverse the judgment of the district court as to Hester's federal claims against IUOE and Local 320 and remand the case to the district court to enable it to consider the merits of those claims. On remand, the district court should revisit the question whether Hester's pendent state law claim should be dismissed or disposed of on the merits. *See Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir.1980) (per curiam) ("That a plaintiff's state law claims will be time-barred if dismissed is certainly a factor, if not a determinative factor, a district court should consider in deciding whether to maintain jurisdiction over pendent state claims once the federal claims have been resolved.") (citations omitted).

'hybrid' suit context without also accepting the rule for when that substantive limitations period begins to run." In my view, this is also a non sequitur. Merely because federal labor policies favor the relatively short limitations period found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), rather than the longer periods available under state statutes, does not necessarily dictate that the limitations period begins at the same time in all actions brought by union members. The appropriate method by which to determine when the statute of limitations starts running is to pinpoint when the union member's cause of action accrues. This can only be done by appreciating the nature of the suit the employee wishes to bring. As my analysis suggests, Hester's suit simply cannot be reasonably analogized to a hybrid suit for purposes of determining when the limitations period begins to run.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-7699

EDWARD C. HESTER,
Plaintiff-Appellant,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al.*,
Defendants-Appellees.

Oct. 20, 1987

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ON PETITION OF INTERNATIONAL UNION OF OPERATING ENGINEERS FOR REHEARING BY THE PANEL

(Opinion June 12, 1987, 11th Cir. 818 F.2d 1537)

PER CURIAM:

We have reexamined the conclusion in our previous panel opinion that "the district court had subject matter jurisdiction over all of Hester's federal claims," 818 F.2d

1537, 1543 (11th Cir.1987). We now offer the following clarification of this statement.

Hester's complaint alleged that his international union, as his exclusive bargaining representative, breached its duty of fair representation by upholding the fine imposed by Local 660 despite the veterans' preference provisions incorporated into the collective bargaining agreement. Hester asserted that the federal district court had jurisdiction under section 3 of the TVA Act, 16 U.S.C. § 831b, which allegedly implies a duty of fair representation actionable in federal court. The district court held that Hester's duty of fair representation claim did not state a cause of action because no binding authority recognized a cause of action for TVA employees against their unions for breach of the unions' duty of fair representation.[1]

The holding in our prior opinion that the district court had subject matter jurisdiction over all of Hester's federal claims does not, of course, resolve the question of whether Hester has a cause of action against the IUOE for breach of its duty of fair representation. As the Supreme Court explained in *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946):

> [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two

---

[1] The district court held that:

> Whether TVA employees have an implied cause of action against their unions arising either from LMRDA or the TVA Act is an open question in the Eleventh Circuit, but this court is unwilling to anticipate that the Eleventh Crcuit [sic] would recognize such a federal cause of action. Although the Sixth Circuit in *Bowman v. TVA*, [744 F.2d 1207 (6th Cir. 1984)], held that unions representing TVA employees are subject to an implied duty of fair representation this decision is not binding on this court.

possible exceptions later noted, must entertain the suit. . . .

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

See also Washington v. Kirksey, 811 F.2d 561 (11th Cir.1987), *petition for cert. filed*, 55 U.S.L.W. 3872 (June 30, 1987); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir.1982). Especially in light of the Sixth Circuit's holding in *Bowman v. TVA*, 744 F.2d 1207 (6th Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), that by implication from section 3 of the TVA Act TVA employees have a cause of action against their unions for breach of duty of fair representation, Hester's federal claim was not frivolous and there is no basis for concluding that the claim was made solely for the purpose of obtaining federal court jurisdiction. Our previous opinion concluded, therefore, that the district court had jurisdiction over Hester's duty of fair representation claim against the IUOE.

Our prior opinion did not, however, decide whether Hester's duty of fair representation claim stated a cause of action. We now decide this question with the following discussion to be inserted as part II.C. of our prior opinion. 818 F.2d at 1543.

C.

As stated above, the collective bargaining agreement between the International Union of Operating Engineers (IUOE) and the TVA contains a provision giving veterans preference in hiring over non-veterans, and disabled veterans preference over non-disabled veterans. Additionally, IUOE's constitution, to which both locals 660 and 320 are bound, contains a provision prohibiting a member of one local union from working in the territorial jurisdiction of another local union without the consent of the latter local. Hester has alleged that Local 660 gave its consent to his working in its jurisdiction by virtue of the veterans' preference provision in the collective bargaining agreement with TVA. There is no evidence, however, that Hester made any attempt to comply with the procedures outlined in IUOE's constitution for obtaining the consent of a local to work in its jurisdiction.

Hester's duty of fair representation claim in this action alleged that the IUOE breached its duty by upholding the "fine [imposed by Local 660] against plaintiff for exercising a right which it had agreed plaintiff should have, viz., veterans' preference to employment by TVA to positions covered by [the] collective bargaining agreement." Hester alleged that this duty of fair representation arose from section 3 of the TVA Act. 16 U.S.C. § 831b. The district court concluded that Hester's duty of fair representation claim fails to state a cause of action because section 3 of the TVA Act does not imply a cause of action for a union's breach of duty of fair representation. We hold, however, that this claim fails to state a cause of action because the claim does not allege conduct by IUOE that was arbitrary, discriminatory, or in bad faith. We do not reach, therefore, the question of whether section 3 of the TVA Act implies a cause of action for breach of a union's duty of fair representation.

The statutory duty of fair representation was developed by the Supreme Court in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining agents under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944). *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953) extended the doctrine to cover unions certified under the National Labor Relations Act ("N.L.R.A."), 29 U.S.C. §§ 141-187. In return for the privilege of serving as exclusive bargaining agent, the union "is under a duty to represent fairly all the employees within the appropriate bargaining unit with respect to matters arising out of the collective bargaining agreement with the company." *Seymour v. Olin Corp.*, 666 F.2d 202 (11th Cir. 1982). This obligation requires the exclusive bargaining agent to serve the interests of all members "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The duty of fair representation applies not only to the negotiation of the collective bargaining agreement, but also to the enforcement of that contract throughout its term. *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979).[2]

Most duty of fair representation claims arise in the context of what are known as "hybrid" suits. Hybrid suits involve claims by an employee against both the employer and the union. For example, a discharged employee might sue his former employer for firing him without just cause in violation of the collective bargain-

---

[2] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

ing agreement and sue his union for breaching its duty of fair representation under the N.L.R.A. by arbitrarily and in bad faith refusing to take his case to arbitration. *See, e.g., Cox, id.* at 140. An employee may, however, have a claim against the union for breach of duty of fair representation without a corresponding claim against the employer. As long as the claim against the union is sufficiently related to the collective bargaining process, it need not be brought as part of a "hybrid" claim. In *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980), for instance, two union members charged their international and local unions with breaching their duty of fair representation by signing a binding project agreement on behalf of the local, where the local's membership had unanimously declined on two prior occasions to participate in the project and the international's constitution required that a majority of the local's membership approve any such contract. The suit involved no claim against the employer, but only against the unions for their bad faith conduct in committing the local to the collective bargaining agreement. Nevertheless, the court found both the local and the international liable for breach of their duty of fair representation. *See also Lewis v. Local 100 of the Laborers' Int'l Union*, 750 F.2d 1368, 1375-77 (7th Cir. 1984); *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276, 1282 (5th Cir. 1982), *vacated on other grounds*, 462 U.S. 1127, 103 S.Ct. 3104, 77 L.Ed.2d 1360 (1983).

Accordingly, to state a claim for breach of duty of fair representation, Hester must allege that his union treated him in an arbitrary or discriminatory manner, or in bad faith, and that the union's conduct was related to its position as exclusive negotiating agent for the collective bargaining agreement. This duty on the part of the union, however, does not permit federal court, review of all of the union's internal affairs. "Because the [duty of fair representation] is imposed on the union as a result

of its position as exclusive bargaining representative, it applies only to union conduct arising from the union's position as representative." *Bass v. International Brotherhood of Boilermarkers*, 630 F.2d 1058, 1062 (5th Cir. 1980).

In the present action, Hester has not alleged sufficient facts to establish that the IUOE's challenged conduct was arbitrary, discriminatory, or in bad faith. Hester challenges the fine imposed upon him by Local 660 and affirmed by the IUOE as violating his right under the collective bargaining agreement to a veteran's preference. The fine, however, was imposed upon Hester for a violation of internal union rules—working in the jurisdiction of a local union without its consent. Hester neither alleged nor produced any evidence to indicate that he attempted to comply with the union procedures for obtaining such consent. Hester has not alleged or shown a facial conflict between the veteran's preference provision and the union's required consent provision; absent any allegation of arbitrary, bad faith, or discriminatory enforcement of the facially valid union rule, we see no inherent conflict between the union's constitution and the collective bargaining agreement.

Accordingly, we affirm on other grounds the district court's dismissal of Hester's breach of duty of fair representation claim for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6).

Except for the above modifications, the petition for panel rehearing is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7699

EDWARD C. HESTER,
Plaintiff-Appellant,

versus

INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION OF LOCAL NO. 660,
INTERNATIONAL UNION OF OPERATING
ENGINEERS AFL-CIO, FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 12, 1987, 11 Cir., 198 , —— F.2d ——).
(October 20, 1987)

Before TJOFLAT and KRAVITCH, Circuit Judges,
and TUTTLE, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7699

EDWARD C. HESTER,
Plaintiff-Appellant,

versus

INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING
(DECEMBER 2, 1987)

BEFORE: TJOFLAT and KRAVITCH, Circuit Judges,
and TUTTLE, Senior Circuit Judge

PER CURIAM:

The petition(s) for rehearing filed by appellant Edward C. Hester is denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7699

D.C. Docket No. 84-5791

EDWARD C. HESTER,
Plaintiff-Appellant,

versus

INTERNATIONAL UNION OF OPERATING ENGINEERS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT OF REHEARING

This cause came on to be heard on defendants-appellees' petition for rehearing;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part, REVERSED in part; and that this cause be and the same is hereby, RE-

MANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 20, 1987

For the Court: Miguel J. Cortez
Clerk

By: /s/ Daird J. Maland
Deputy Clerk

Issued as Mandate: Dec. 23, 1987

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 84-AR-5791-NW

EDWARD C. HESTER,

Plaintiff

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et al.*,

Defendants

ORDER

In conformity with the accompanying Memorandum Opinion, the court expressly determines that there exists no genuine issue of material fact bearing on the jurisdictional question and that defendant is entitled to judgment, as a matter of law, and that this court is without jurisdiction of the subject matter and cannot assume jurisdiction over a purely state claim. It is therefore

ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment are GRANTED, and the action is DISMISSED WITHOUT PREJUDICE. The motion to strike the pendent state claim is MOOT.

Costs are taxed against plaintiff.

DONE this 15th day of September, 1985.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

Civil Action No. 84-AR-5791-NW

EDWARD C. HESTER,
Plaintiff

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et al.*,
Defendants

[Filed Oct. 15, 1985]

MEMORANDUM OPINION

Edward C. Hester (Hester) sues the International Union of Operating Engineers (IUOE) and two of its Locals, 660 and 320, alleging violations of the procedural requirements of 29 U.S.C. § 411(a)(5), the applicable collective bargaining agreement, and IUOE's duty of fair representation. Hester has also amended his complaint to add an alleged pendent state law claim. Pursuant to F.R.Civ.P. 12(b)(6), and F.R.Civ.P. 56 (b), defendants have filed motions to dismiss the pendent state claim and motions for summary judgment on the federal claims. Jurisdiction is premised on 28 U.S.C. §1337 and 29 U.S.C. § 401, *et seq.* (§ 412 of the Labor Management Reporting & Disclosure Act).

The Undisputed Facts

At all pertinent times Hester was a member of the IUOE and its Local 320. He is a crane operator. IUOE

entered into a collective bargaining agreement with TVA. This collective bargaining agreement contains a provision preferring veterans over non-veterans in hiring decisions. This section reads in pertinent part:

> H-III. Selection for Appointment and Promotion
>
> A. Appointment
>
> 1. Applicants who meet the qualification requirements of a position are considered as follows for appointment. Applicants with status of veteran with a compensable disability of 10 percent or more incurred in military service are appointed first in the order of their qualifications. The remaining applicants considered for appointment are divided into three groups: outstanding, well-qualified, and qualified. Applicants in the "outstanding" group are appointed first, then applicants in the "well-qualified" group, then in the "qualified" group. Within a qualifications group, applicants with veterans' preference are appointed before those without such preference. Among those with veterans' preference, applicants who have status as non-compensable disabled veterans' are appointed first. Membership in a union affiliated with the Council is a positive factor of merit and efficiency which is considered in determining relative qualifications for appointment.

Local 320 represents heavy equipment operators engaged in construction for TVA. Local 660 represents heavy equipment operators engaged in maintenance work for TVA in Alabama. IUOE's constitution prohibits members of one local from working within the jurisdiction of another local without that local's consent. However, when Local 660 does not have any qualified veterans to refer to TVA, it refers qualified members of other locals, including Local 320, to TVA.

Hester was employed by TVA at Yellow Creek in Iuka Mississippi, which is within Local 320's jurisdiction. TVA began laying off workers. Hester was "rolled off" this job by a disabled veteran. Pursuant to the collective bargaining agreement between TVA and IUOE Hester sought employment by attempting to "roll off" a non-veteran at another work site. Hester was called back to work by TVA at the Brown's Ferry TVA site in Athens, Alabama, which is within Local 660's jurisdiction. Local 660 had referred a non-veteran to TVA, but TVA, pursuant to the collective bargaining agreement, hired Hester, the veteran. Local 660 then initiated disciplinary proceedings against Hester for working within its jurisdiction without its consent. Hester was found guilty on November 8, 1983, and was fined $3,000 by Local 660. Hester appealed to IUOE which waived his fine pending resolution of his appeal. On August 6, 1984, IUOE denied Hester's appeal but reduced his fine to $500.00. Hester filed suit in this court on November 7, 1984.

Hester's first cause of action alleges that the fine which Local 660 and IUOE imposed and Local 320's refusal to accept his dues were disciplinary actions in violation of 29 U.S.C. § 411(a)(5). His second cause of action alleges that Local 660 violated the applicable collective bargaining agreement. The third cause of action alleges that IUOE breached its duty of fair representation. Hester's alleged pendent state claim is based on Alabama contract law.

The Applicable Law

Hester is barred from litigating his claims in federal court because this court lacks subject matter jurisdiction. Hester's claims against Local 660, Local 320 and IUOE under LMRDA are based on his allegations that defendants' actions violated the procedural requirements of 29 U.S.C. § 411(a)(5). However, both the employer and the labor organization must be subject to the Act in order for its provisions to apply to either of them. *Local*

1498 American Federal of Gov't Employees v. American Federation of Gov't Employees, 522 F.2d 486 (3rd Cir. 1975). As will hereinafter become apparent the employer is not subject to the Act and therefore LMRDA does not apply to the relationship between Hester and his unions and thus this court does not have subject matter jurisdiction.

The following restrictions on disciplinary action which labor organizations may impose on their members are provided in 29 U.S.C. § 411(a)(5):

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.
>
> (b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

A "labor organization" under LMRDA is defined in 29 U.S.C. § 402(i), as follows:

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, *of dealing with employers* concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other

than a State or local central body. (emphasis supplied).

Thus, in order for a labor organization to be subject to the provisions of the LMRDA "a 'labor organization' must deal with *an employer* and act as the representatives of employees of *an employer*". *Local 1498 American Federation of Gov't Employees, supra*, at 490. "[A] labor organization is not covered unless it represents, or is chartered to represent, or is actively seeking to represent 'employees' of an '*employer*' as those terms are defined in the Act." (emphasis supplied). *Id.* quoting *Smith, The Labor-Management Reporting & Disclosure Act of 1959*, 49 Va. L. Rev. 195, 199 (1960).

The TVA is not an "employer" within the meaning of LMRDA because 29 U.S.C. § 402(e) expressly excludes it from the LMRDA definition of "employer":

> "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States *or any corporation wholly owned by the Government of the United States* or any State or political subdivision thereof. (emphasis supplied).

Thus, by definition, TVA and the unions with which it contracts (in this case Local 660, Local 320 and IUOE) are not subject to the provisions of LMRDA. *See also*,

Bowman v. TVA, 744 F.2d 1207 (6th Cir. 1984), and *McDavid v. TVA*, 555 F. Supp. 72 (E.D. Tn. 1982).

The foregoing analysis is, of course, also applicable to Hester's cause of action against Local 660 alleging that Local 660 operated its hiring hall in violation of the applicable collective bargaining agreement by preferring non-veteran over veterans in its hiring decision.

Perhaps it should also be noted that this court does not have subject matter jurisdiction under the LMRDA of this claim for a separate and distinct reason, namely, that LMRDA does not govern charges that a *union* has violated the applicable collective bargaining agreement. *See Lucas v. Kenny*, 220 F. Supp. 188 (N.D. Ill. 1963). Assuming arguendo that the proper statute, 29 U.S.C. § 185, had been invoked, the above subject matter jurisdiction analysis would be equally applicable. *See*, 29 U.S.C. § 152(2), 29 U.S.C. § 142(3), 5 U.S.C. § 7103 (a)(3). *See also, Bowman v. TVA, supra* (TVA is not subject to the LMRA), and *McDavid v. TVA, supra.*

Hester's last cause of action is based on his allegation that IUOE breached its duty of fair representation. Since neither TVA nor IUOE are subject to LMRDA and thus are exempt from any duty of fair representation it impliedly contains, this court cannot imply a duty of fair representation for TVA employees from LMRDA. The same is true of the TVA Act, 16 U.S.C. § 831 which cannot be construed to create such a cause of action. *See, Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Whether TVA employees have an implied cause of action against their unions arising either from LMRDA or the TVA Act is an open question in the Eleventh Circuit, but this court is unwilling to anticipate that the Eleventh Circuit would recognize such a federal cause of action. Although the Sixth Circuit in *Bowman v. TVA, supra*, held that the unions represent-

ing TVA employees are subject to an implied duty of fair representation this decision is not binding on this court. Moreover, in *Bowman* the unions did not contest the contention that they are subject to a federally enforceable duty of fair representation. In Hester's case the unions have contested this court's jurisdiction over this issue, and even if they had not this court necessarily examines its own jurisdiction. Federal courts are courts of limited jurisdiction. Subject matter jurisdiction must appear clearly and distinctly in the pleadings. *See, Wymard v. McCloskey & Co.*, 342 F.2d 495 (3rd Cir. 1965) *cert. denied* 382 U.S. 823, 86 S.Ct. 52; *Koll v. Wayzata State Bank*, 397 F.2d 124 (8th Cir. 1968); *International Assn. of Machinists v. Central Airlines, Inc.*, 295 F.2d 209 (5th Cir. 1961); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

Hester's pendent state claim will also be dismissed without prejudice, inasmuch as a prerequisite to the federal courts' power to hear pendent state claims is federal subject matter jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Because the court finds that it is without jurisdiction it is unnecessary to discuss defendants' other alleged absolute defenses, namely, the statute of limitations and non-exhaustion of internal union remedies.

A separate order will be entered dismissing the action without prejudice.

DONE this 15th day of October, 1985.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

(3)

FILED
MAR 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 660,

Petitioner,

v.

EDWARD C. HESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

C. V. Stelzenmuller
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Respondent

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

19pp

NO. 87-1456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 660,

Petitioner,

v.

EDWARD C. HESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

C. V. Stelzenmuller
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Respondent

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 9

CONCLUSION..... 14

CERTIFICATE OF SERVICE..... 15

TABLE OF AUTHORITIES

Bonner v. City of Prichard,
661 F.2d 1206, 1209
(11th Cir. 1981)..... 8

Davis v. UAW, 765 F.2d 1510
(11th Cir. 1985) cert. denied,
474 U.S. 1057..... 7

Del Costello v. Teamsters,
462 U.S. 151 (1983)..... 8,9
11,13,14

Dunleavy v. Steelworkers,
814 F.2d 1087 (6th Cir., 1987)... 12

Reed v. Transportation Union,
828 F.2d 1066 (4th Cir. 1987)
cert. granted, 56 LW 3601
(March 8, 1988)..... 9,10

Sewell v. International Association
of Machinists, 445 F.2d 545
(5th Cir., 1971), cert. denied,
404 U.S. 1024 (1972)..... 7,8
11,13

I. STATEMENT OF THE CASE

Petitioner's statement of the questions presented for review does not comply with the requirement of Rule 21.1(a) that it not be argumentative. Petitioner disingenuously frames the question to include a hypothesis "if the putative plaintiff pursues an independent remedy created by the international union to review the local's action" begging the question whether an appeal under a union constitution from a fine is "independent," which at best can be fairly controverted. Since Rule 21.1(a) allows only the questions set forth in the petition or fairly included therein to be considered, and the only question alleged in the petition is so argumentative that it can not be presented for review as stated, the

petition is due to be denied.

The assertion (Pet. 1) that "Hester did not seek or obtain the consent of the Local before accepting that job" distorts the record. The Respondent is a crane operator, a veteran, and a member of the International Union of Operating Engineers (IUOE) and its Local 320, which were parties below. IUOE has a collective bargaining agreement with Tennessee Valley Authority (TVA) giving preference in the employment of equipment operators, to members of appropriate Locals of IUOE. This closed shop arrangement, implemented through Local hiring halls, would clearly violate 29 U.S.C.A. §§158(a)(3) and 158(b)(2) if those statutes applied to TVA. There is, however, one provision in the IUOE-TVA contract which overrides the closed shop preference in employment

to members of IUOE Locals within their "jurisdictions:" namely, a provision that veterans will have preference in employment over non-veterans, and disabled veterans over ordinary veterans. After having been displaced from a TVA job at Yellow Creek Power Plant by a disabled veteran, Hester asked TVA to place his name on the veterans preferential hiring list. He also sought to transfer his membership from Local 320 to the Petitioner, Local 660, which permission was denied by Petitioner as the IUOE Constitution allowed it to do arbitrarily, that is, without giving any reason. TVA then had a vacancy on a maintenance job at Brown's Ferry and, after ascertaining that Local 660's hiring hall had no veteran to refer, TVA hired Respondent. Respondent tendered "Travel Services

Dues" (App. 2a n.2) to the job steward, but he refused them upon instructions of Local 660's Business Agent Wisdom. Wisdom then asked Hester to quit, to give the job to a non-veteran member of Local 660. He did not quit and Petitioner commenced a disciplinary proceeding against him alleging generally that he had worked in its jurisdiction without its consent and violated unspecified Local rules. As provided in the subdivision of the IUOE Constitution relating to disciplinary matters, Hester appealed his $3,000 in fines imposed on November 10, 1983 to the IUOE General Executive Board. The IUOE informed Hester on December 9, 1983 that "payment of his fine is hereby waived pending. . . appeal." The IUOE Constitution prohibits members from bringing suits "unless all rights,

remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been. . . exhausted. . . . This provision shall only require resort to internal remedies for a period not exceeding four (4) months."

On August 6, 1984, the General Executive Board reduced the fines to $500 and affirmed them, adopting a report which read:

> "It is the position of Local Union No. 660 that Brother Hester, after being denied clearance by the Local Union, accepted employment with TVA in a job classification over which Local 660 has jurisdiction at a time when members of Local 660, qualified to accept the position, were out of work and available. . . .
>
> "Brother Hester's veteran's preference status would only have been relevant had he obtained clearance from the Local Union."

The first quoted sentence above

contradicts the statement in the Petition (Pet. 4) that "Hester did not seek. . . the consent of the Local before accepting that job." The last sentence amounts to saying that Local 660 can arbitrarily deny "clearance" to a person entitled to a TVA job under the collective bargaining contract to which it consented by its agent IUOE, and then enforce a closed shop and a closed union through intra-union discipline. On November 7, 1984 Respondent Hester commenced this action asserting claims under LMRDA §§101(a)(4) and 102, 29 U.S.C.A. §§411(a)(4) and 412; for breach of the duty of fair representation; and for improper discipline under pendent State law.

The district court granted summary judgment with respect to the federal claims on erroneous notions of subject

matter jurisdiction; it did not address any limitations questions (Pet.App. 54a-60a).

On appeal, a panel of the Eleventh Circuit reversed with respect to jurisdiction of the federal claims; the panel unanimously held that NLRA §10(b), 29 U.S.C.A. §160(b)'s six-month limitation applied to Hester's LMRDA claim; this followed a panel decision in Davis v. UAW, 765 F.2d 1510 (11th Cir. 1985), cert. denied, 474 U.S. 1057, decided after this action was commenced, but was contrary to established case law of the Fifth Circuit at the time it was commenced. Sewell v. International Association of Machinists, 445 F.2d 545 (5th Cir., 1971), cert. denied, 404 U.S. 1024 (1972), borrowing the Alabama one-year limitation to LMRDA claims arising in Alabama. It was also contrary to

decisional law of the Eleventh Circuit adopting as stare decisis prior decisions of the Fifth, which could not be overruled by a panel of the Eleventh, but only by the Eleventh en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981). The panel overruled Sewell retroactively, saying that it "was compelled [to do so] by the intervening Supreme Court decision in Del Costello v. Teamsters, 462 U.S. 151 (1983)" (Pet.App. 13a, 11-17); in effect, holding that Del Costello had overruled Sewell. However, the majority of the panel further decided that the six-months statute did not begin running or was "tolled" by the pendency of Hester's intra-union appeal. (Petition App. 23a). It is this ruling that the Petition says "is fundamentally inconsistent with the decisions of this

Court, and of other courts of appeals, and contrary to the national labor policy." (Pet. 8).

REASONS FOR DENYING THE WRIT

The ruling complained of is not inconsistent with any decisions of this Court, nor of other courts of appeals, nor is it contrary to any national labor policy. Petitioner has failed to present any "special and important reasons" for the issuance of a writ of certiorari. Sup.Ct.Rule 17. Contrary to the petition, the ruling complained of does not present any issue warranting consideration by the Court.

There is, to be sure, a conflict among the Circuits post-Del Costello as to whether the §10(b) six-months limitation applies to suits under LMRDA §§101 and 102. Recently this Court granted certiorari in the case of Reed

v. Transportation Union, 828 F.2d 1066 (4th Cir. 1987), cert. granted, 56 LW 3601 (March 8, 1988), to resolve this conflict. But the resolution of that conflict cannot help petitioner's cause; on the contrary, if this Court should reverse Reed v. Transportation Union, supra, the question herein sought to be reviewed would be moot; for Hester's LMRDA claims would then clearly be commenced timely without recourse to tolling.

The substance of the Eleventh Circuit's holding is that the statute does not run on a LMRDA §101 claim, until the plaintiff knew or should have known of the union's final action or where the intra-union procedure "was exhausted or otherwise broke down to

[his] disadvantage (Pet.App. 17a).[1/] It based this result on the idea that if the Del Costello reasoning on limitations is borrowed,[2/] then for like reasons of policy the reasoning of that case and its progeny about when the statute runs must also be borrowed (Pet.App. 18a, n.23). Nothing in the law or the IUOE Constitution prohibited Hester from maintaining his intra-union

---

1/ The court below at some points used language of tolling (Pet.App. 18a, n.23), and at others language of accrual or when the "section 10(b) limitations period begins to run." (Pet.App. 17a). It is of no great moment which terminology is used.

2/ The Eleventh Circuit refused to follow Sewell v. Machinists, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1922), and overruled its holding that the Alabama one year statute applied to an LMRDA §§101-102 claim arising in Alabama on the reasoning that this refusal "was compelled by the intervening Supreme Court decision in Del Costello." (Pet.App. 13a, n.17).

appeal beyond four months, although they did not require this. The IUOE had "waived" or stayed the fines pending resolution of the appeal (nor for just four months) (Pet.App. 31; Pet.5). Had the appeal never been decided, Hester's discipline remained hypothetical, speculative, and subject to a condition precedent; under the ripeness doctrine, his claim would have not presented "a real, substantial controversy" until the fines were affirmed. There is no decision of this Court or any Circuit in conflict with the Eleventh Circuit's resolution of this question. On the contrary, the only other Circuit which has considered precisely the same question decided it as the Eleventh Circuit did. Dunleavy v. Steelworkers, 814 F.2d 1087 (6th Cir., 1987). In fact, the Petition (Pet. 12) actually

admits that there is no actual conflict with any decision but at most an argument from analogy.

Granting the petition would necessarily involve additional questions such as whether the Eleventh Circuit should give retroactive effect to a six-months limitation period when it was clearly stare decisis in that Circuit when Hester filed this action, that a one-year state statute applied (Sewell v. Machinists, supra)[3/] and whether the

---

3/ The statement by the Eleventh Circuit (Pet.App. 13a, n.17) that it was compelled by Del Costello to ignore the Sewell case conflicts with the assertions in the Petition (Pet. 16-17) that the Eleventh Circuit "based its decision principally upon a supposed analogy to hybrid §301/fair representation litigation. . . . That conclusion overlooks the fact that '[t]he contractual [grievance] procedures at issue in a hybrid lawsuit 'are significantly different from. . . internal union procedures'. . . ." Petitioner's attack on the Eleventh Circuit's reasoning as to tolling or time of accrual, if successful,

IUOE's staying of the fine raised a question of fact triable by jury as to equitable tolling or estoppel to plead the statute.

CONCLUSION

The Petition simply does not present any issue worthy of review at this time upon writ of certiorari.

Respectfully submitted,

C. V. Stelzenmuller

Footnote Continued

would necessarily contradict that Court's reasoning that Del Costello compels application of the §10(b) six-months statute to Hester's LMRDA claim and would moot the "Question Presented." The internal inconsistency in Petitioner's arguments is a reason for denying the writ, for this Court should not squander its limited resources absent a clear-cut case and controversy necessarily presenting an issue of general importance.

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief in Opposition has been served upon Thomas N. Crawford, Jr., Esq., Cooper, Mitch, Crawford & Kuykendall, 409 North 21st Street, Birmingham, Alabama 35203, James T. Langford, Esq., Jacob and Langford, 1000 Rhodes-Haverty Building, 134 Peachtree Street, N.W., Atlanta, Georgia 30303, Donald R. Rhea, Esq., Rhea, Boyd & Rhea, 930 Forrest Avenue, Gadsden, Alabama 35901 and David Silberman, Esq., 815 16th Street, N.W., Washington, D.C. 20006 by placing same in the United States mail, postage pre-paid on this the 30th day of March, 1988.

OF COUNSEL